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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA
GENERAL JURISDICTION DIVISION
CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO

COMPANY, et al.,

Defendants.

Miami-Dade County Courthouse
Miami, Florida
1:55 p.m.
Tuesday, December 15, 1998

TRIAL - VOLUME 160

The above-styled cause came on for trial
before the Honorable Robert Paul Kaye, Circuit

Judge,

pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.

SUSAN ROSENBLATT, ESQ.

On behalf of Plaintiffs

DECHERT PRICE & RHOADS

ROBERT C. HEIM, ESQ.

SEAN P. WAJERT, ESQ.

On behalf of Defendant Philip Morris

COLL DAVIDSON CARTER SMITH SALTER & BARKETT

NORMAN A. COLL, ESQ.

On behalf of Defendant Philip Morris

ZACK KOSNITZKY

STEPHEN N. ZACK, ESQ.

On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER

R. BENJAMINE REID, ESQ.

On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE

RICHARD M. KIRBY, ESQ.

On behalf of Defendant R.J. Reynolds

KING & SPALDING

MICHAEL RUSS, ESQ.

RICHARD A. SCHNEIDER, ESQ.

On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY

KELLY ANNE LUTHER, ESQ.

On behalf of Defendants Liggett Group

and Brooke Group

SHOOK HARDY & BACON

EDWARD A. MOSS, ESQ.

WILLIAM P. GERAGHTY, ESQ.

On behalf of Defendant Brown & Williamson

JAMES T. NEWSOM, ESQ.

On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON

ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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(APPEARANCES - Continued)
GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard
MARTINEZ & GUTIERREZ
JOSE MARTINEZ, ESQ.
On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute
KASOWITZ BENSON TORRES & FRIEDMAN
AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

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None.	

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had:) 1 (Whereupon, the following proceedings were
What 2 THE COURT: Have a seat, please. Okay.
3 have we got?
minutes 4 MR. HEIM: Your Honor, just maybe two
5 with regard to the next witness, and I believe
he's 6 here. So maybe we could excuse him for a second.
7 (The witness exited the courtroom.)
8 MR. HEIM: This is Dr. Mele, who is a
former 9 employee of Philip Morris.
10 MR. ROSENBLATT: M-e-l-e, Paul.
11 MR. HEIM: Just so Your Honor knows, Mr.
Mele 12 was an employee of Philip Morris. He was a
research 13 scientist employed by the company from 1981 until
1984.

14 Based on his deposition, which was taken
last
15 week, it's my understanding that he is here
testifying
16 as a fact witness only, and his disclosure says as
17 much, and he has also testified that, by virtue of
the
18 agreement that he has with his employer, the
Department
19 of the Army, he is not to give opinion testimony;
so
20 he's here to give fact testimony.
21 I only raise that subject because I
would
22 expect that there would be a foundation laid for
23 personal knowledge with regard to his fact
testimony of
24 what happened during his employment from 1981 to
1984.
25 THE COURT: What has the Army got to do
with

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1 him rendering an opinion?
2 MR. HEIM: The Army has certain policies
3 about what they will permit one of their
scientists to
4 do in testifying in some other case. And as I
5 understand it, they provided him with a letter
that
6 said you can testify as a fact witness, but he
can't
7 give opinions or testify as an expert as a term of
his
8 employment. That's my understanding, anyway.
9 MR. ROSENBLATT: There is no --
10 THE COURT: Do you think that would hold
up
11 in a court of law?
12 MR. HEIM: I have no idea. I don't know
what
13 the Army will do, Judge.
14 MR. ROSENBLATT: There is no problem
with the
15 Army. The Army apparently has a policy where, if
he
16 wanted to hire himself out as an expert, as a pure
17 expert --
18 THE COURT: Hire himself.
19 MR. ROSENBLATT: -- in a case that he
had no
20 personal knowledge of, that they have a policy.
He's
21 got no problem.
22 THE COURT: You're putting him on as a
fact
23 witness, though. You are not going to elicit
opinion
24 testimony?
25 MR. ROSENBLATT: I'm going to try.

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1 It's our position, Judge, that with a
2 scientist, he is a fact witness. You know,
without any 3 question. But --
4 THE COURT: Well, you've designated him
as a 5 fact witness and not as an expert. So the rules
6 provide that he doesn't register an opinion. All
7 right. But that's very strange that the Army can
8 control a witness's testimony.
9 But I can understand the position where
they 10 wouldn't want somebody hired out as an expert.
That I 11 can understand. But if he's subpoenaed to appear,
12 what --
13 MR. HEIM: As I understand it, I could
be 14 wrong, but as I understood it, it's a matter of if
he 15 wants to volunteer to give testimony in a case
other 16 than one involving his employer, they, for some
reason, 17 have some rules on what he can do and what he
can't do. 18 But he's here as a fact witness anyway.
19 THE COURT: We won't have to deal with
it. 20 MR. MOSS: Judge, there is a federal
21 regulation dealing with all this. We come across
it 22 all the time with FAA people, so this is not
something 23 prohibiting opinion testimony.
24 THE COURT: Well, maybe within the field
he 25 is working, such as an aviation expert working for
the

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1 FAA. But supposing he changed jobs. For example,
he 2 was a chemist over here and now he's doing
something 3 else.
4 MR. HEIM: No. What was he, Stan,
behavioral 5 psychologist or something?
6 MR. ROSENBLATT: Correct.
7 THE COURT: Is that what he is?
8 MR. HEIM: He worked with rats in the
rat 9 lab.
10 THE COURT: Okay. I won't touch that
one. 11 Okay. Let's bring the jury in. I've
got all

12 this material here that belongs to somebody. I
don't
13 think this is evidence marked as such. But
somebody's
14 got to pick this stuff up.
15 THE BAILIFF: Bringing in the jury.
16 (The jurors and witness entered the
17 courtroom.)
18 THE COURT: Okay. All accounted and
present
19 for? You may be seated, please.
20 Okay. Witness?
21 MR. ROSENBLATT: Dr. Mele?
22 Thereupon:
23 PAUL C. MELE, Ph.D.,
24 having been called as a witness, was duly sworn,
25 examined, and testified as follows:

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1 DIRECT EXAMINATION
2 BY MR. ROSENBLATT:
3 Q. Finally we got to you. Dr. Mele, please
tell
4 the members of the jury your full name and your
present
5 address.
6 A. My name is Paul Camille Mele. I live in
7 [DELETED].
8 Q. You spell your last name M-E-L-E?
9 A. Correct.
10 Q. The jury is very familiar with what a
11 curriculum vitae is, and I'm going to go through
your
12 curriculum vitae. But initially I want to
establish at
13 one time you were employed by the Philip Morris
Tobacco
14 Company, correct?
15 A. That is correct.
16 Q. During what time frame were you employed
by
17 Philip Morris?
18 A. I started working at Philip Morris in
19 November of 1981, and stopped working there in
December
20 of 1984.
21 Q. Okay. Let me begin with your
educational
22 background. Then I'll take you through your work
23 history. You received a Bachelor of Science
degree in
24 biology and psychology in 1971; is that correct?
25 A. Correct.

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1 Q. And from what institution was that?
2 A. Union College in Schenectady, New York.
3 Q. And then you received an M.A. degree in
4 experimental psychology in 1975. And from what

5 university?
6 A. Adelphi University in Garden City, Long
7 Island.
8 Q. New York?
9 A. New York.
10 Q. The M.A. stands for what?
11 A. Master of Arts.
12 Q. And then after you completed your Master
of
13 Arts, you continued your schooling, and you
received a
14 Ph.D. degree, also in experimental psychology, and
this
15 was in 1980?
16 A. Correct.
17 Q. Now, for example, the witness who
testified
18 before you -- you know, we hear these words
19 psychologist, psychiatrist, and there are
different
20 kinds.
21 Dr. Arnett was a developmental
psychologist.
22 You've got a Ph.D. in experimental psychology.
Tell us
23 what field that encompasses, experimental
psychology.
24 A. That's a research degree that trains you
to
25 conduct studies on various aspects of behavior.
My

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the
1 specialty had to deal all with animal work, and
2 vast majority of my training and work in graduate
3 school was in the field of behavioral pharmacology
4 where we were looking at the effects of drugs on
the
5 behavior, using rats, and also trying to get some
idea
6 on how those drugs affected the brains of the rats
as
7 it altered their behavior.
8 Q. So as an experimental psychologist, you
do
9 not get involved with treating people --
10 A. Correct.
11 Q. -- and diagnosing people and that kind
of
12 thing.
13 A. That's correct.
14 Q. Now, in looking at your work history,
and I'm
15 a little confused by this, after you completed
your
16 Ph.D. in 1980, there is a listing here from 1979
to
17 '81, post-doctoral trainee at the Environmental
18 Toxicology Center, University of Wisconsin in
Madison.

19 Did that follow?
20 A. Yes. Essentially I completed graduate
work
21 at the end of '79. The degree wasn't conferred
until
22 January, 1980, and it was just before that that I
went
23 to Wisconsin to do post-doctoral work. So it was
--
24 '79 I left graduate school. The end of '79 I
started
25 at Wisconsin.

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1 Q. And what was the focus of your post-
doctoral
2 work at the University of Wisconsin?
3 A. That was to examine the effects of toxic
4 agents, instead of drugs, more environmental
5 pollutants, lead, polychlorinated biphenyls,
dioxins,
6 on the development and behavior of monkeys. We
7 examined both the behavior and brain development
and
8 how they were altered by exposure to these
9 environmental pollutants early in life.
10 Q. Okay. Now, going through in
chronological
11 order, there's obviously a listing when you were a
12 research scientist at Philip Morris, but I'll deal
with
13 that separately.
14 A. Okay.
15 Q. I'm going to go through the other
positions
16 that you've held.
17 For a period of time you taught in the
18 department of psychology at Virginia Commonwealth
19 University. Was that also when you were at Philip
20 Morris?
21 A. Yes. While we were at Philip Morris, I
22 obtained an adjunct professorship at VCU where we
were
23 able to teach on a small scale.
24 Q. And after you left Philip Morris, you
went to
25 work for the United States government, the
Department

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1 of Defense?
2 A. Correct.
3 Q. And specifically it says from 1985 to
1989,
4 you were a research psychologist, behavioral
sciences
5 department, Armed Forces Radiobiology Research
6 Institute in Bethesda, Maryland. So tell us what
your

7 work involved during that time frame.
8 A. That was a DOD, Department of Defense
9 research lab, and the work there involved
evaluating 10 the effects of ionizing radiation, and drugs that
would 11 protect against ionizing radiation on the behavior
of 12 animals, primarily rats and monkeys, and also on
some 13 of the brain effects of radiation and how it would
14 again affect behavior.
15 Q. What do you mean when you say ionizing
16 radiation?
17 A. Ionizing radiation is the radiation you
get 18 from nuclear weapons explosions and also radiation
that 19 you find in space, things the astronauts up there
are 20 being exposed to right now. So it was DOD's
primary 21 lab for studying the effects of this one kind of
22 radiation.
23 Q. And I see from 1990 to 1994, you were
the 24 project manager, Complex Task Performance Project,
25 behavioral sciences department, Armed Forces

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1 Radiobiology Research Institute.
2 Did your function there differ from what
3 you've already told us about or pretty similar?
4 A. It was a promotion. I managed a
laboratory 5 then. I had several Ph.D.'s working under me in
6 addition to conducting my own studies. So it was
just 7 a progression to a more responsible position.
8 Q. But doing essentially the same --
9 A. Same work, similar --
10 Q. -- same field?
11 A. Same areas.
12 Q. Now, at some point you made a transfer
within 13 the Department of Defense, and presently you're at
the 14 Walter Reed Army Hospital?
15 A. The Walter Reed Army Institute of
Research, 16 which is located next to the Walter Reed Army
Medical 17 Center, next to the hospital yes.
18 Q. When did you go with the Walter Reed
Army 19 Institute of Research?
20 A. In February of 1995.
21 Q. And you've been there ever since?
22 A. Correct.
23 Q. Doing what?
24 A. My job there is to take the results of

25 biomedical research conducted by the Army. We do
a lot

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1 of work on drugs and vaccines against infectious
2 diseases such as malaria, things the soldiers
would be
3 exposed to if they are fielded, and we try and
develop
4 those two actual products, either with a
commercial
5 partner who might make these for us or finding
someone
6 who we can partner with and continue their
development
7 so that we get products that the soldiers can use
when
8 they deploy.
9 Q. Okay. Now, in terms of how you describe
your
10 scientific expertise on your curriculum vitae, one
11 field is behavioral pharmacology.
12 A. Correct.
13 Q. And that's exactly what?
14 A. The study of how drugs alter behavior,
very
15 simply; how drugs alter behavior by changing
functions
16 in the brain, chemistry in the brain; and how that
is
17 translated into the behavior of the animal.
18 Q. Well, for example, when you study rats
or
19 monkeys, how drugs alter the behavior of rats or
20 monkeys, what conclusions does that kind of
research
21 allow you to reach in terms of human behavior?
22 A. Well, animals certainly serve as a very
valid
23 model for studying the effects of drugs on
behavior.
24 There's no drug development that goes on, whether
it's
25 behavioral drugs, the kind I've studied, or other

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1 drugs, antibiotics, that are not first run in
animal
2 tests.
3 In my earlier work, there are certain
other
4 animal tests that are designed to mimic or
identify
5 drugs you might use to treat psychiatric diseases.
We
6 have animal tests that identify the anxiolytics,
drugs
7 to treat psychosis, depression. So these animal
models

would 8 are a step along the way in developing drugs that
9 be used in people.
field a 10 Q. Now, we've also learned that whatever
11 professional is in, whether he's an M.D. or Ph.D.,
12 there are certain professional journals which are
of 13 particular interest to specialists in a particular
14 field.
15 A. Uh-huh.
16 Q. You are a reviewer for a journal called
17 Pharmacology, Biochemistry and Behavior. Just
tell us 18 in a general way the kinds of scientists that
would 19 subscribe to that publication, and what that
20 publication deals with usually.
21 A. That's a very broad journal, as its
title 22 implies, because it covers three big areas:
Behavior, 23 pharmacology and biochemistry. And in general, it
24 reports on the effects of animal or human
research, 25 where animals or humans may be given a drug; and
the

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1 interest is to see what that drug does, whether it
2 improves learning, such as studies against
Alzheimer's 3 disease, how it affects brain activity that then
might 4 be translated into a behavioral change; it would
study 5 a lot of drug abuse literature, what drugs are
abused, 6 how they are abused, how we can treat that drug
abuse.
7 Q. Now, in terms of professional
organizations, 8 just to mention two, you are a member of the
Behavioral 9 Pharmacology Society as well as the Behavioral
10 Toxicology Society?
11 A. Correct.
12 Q. What is the difference between those
two? 13 A. They're very similar, but they have a
14 different emphasis on the types of chemicals they
15 study. The behavioral pharmacologist is often
16 interested in drugs that would be used for
17 psychotherapeutic treatments, anxiety, depression,
18 schizophrenia or drug abuse, cocaine, heroin,
morphine, 19 nicotine.
20 The behavioral toxicologist is
interested 21 more in things like environmental contaminants,
lead,

22 polychlorinated biphenyls, mercury, that sort of
thing.
23 So, it's really a matter of what you're
24 looking at as much as anything else.
25 Q. Now, I'm going to ask you specifically
about

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1 a few of your publications.
2 I notice that with several of your
3 publications you had one or more coauthors, and in
4 several of these publications you list someone
named De
5 Noble.
6 A. Correct.
7 Q. Who is that?
8 A. Dr. Victor De Noble. He was my
supervisor,
9 my immediate supervisor while I worked at Philip
10 Morris.
11 Q. He had a Ph.D. in what field? Same as
you or
12 different one?
13 A. In the same field. We actually came
from the
14 same graduate school, so he also was an
experimental
15 psychologist with a behavioral pharmacology
background,
16 and he went and received additional training in
the
17 drug abuse field prior to coming Philip Morris.
18 Q. Now, the articles that you authored with
19 Dr. De Noble, were all of them specifically
related to
20 your work during the period of time you were
employed
21 at Philip Morris?
22 A. I believe so, yes.
23 Q. Let me ask you about --
24 A. I would have to read the titles.
25 Q. I will. That's exactly what I'm going
to do.

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1 There is one article by you and De
Noble:
2 Intravenous Self Administration of Phenobarbital
and
3 Ethanol in Rats.
4 What was the thrust of that article
about?
5 A. That study also was conducted with our
6 colleagues at Virginia Commonwealth University.
It
7 examined the effects of rats self-administering or
8 working for phenobarbital alone and alcohol alone,
and
9 then we put the two drugs together to see how that

10 would affect the rat's self-administration or how
hard
11 the rat would work to obtain that.
12 What we found out is that clearly the
rats do
13 work hard to maintain phenobarbital as injected
14 directly into its veins, and when you add alcohol
to
15 it, they work even harder. The two drugs together
are
16 more powerful than either drug alone.
17 Q. The concept of self-administration, when
18 you're talking about rats, how do you use the --
how do
19 rats self-administer to themselves a given drug or
20 medication?
21 A. There's several ways you can do it. The
way
22 we did it, you actually implant a catheter, a
small
23 tube into the vein of a rat. It lies in just
above his
24 heart, it comes out above the back, it travels
under
25 the skin. It's a surgical procedure, relatively
simple

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1 to do. They're sewn up, they heal very quickly,
and
2 the animal is placed in a box. He lives in a
small
3 experimental chamber, and every time he presses a
4 lever, he gets a small squirt or dose of the drug
in a
5 bottle.
6 Now that's a very standard procedure for
7 studying intravenous self-administration in an
animal.
8 Very reliable. Well-characterized.
9 Q. Does the rat know how to press the
lever?
10 How does the rat know, at least in the first
instance?
11 A. Again, there are several ways you can do
it.
12 The way we like to do it, rats learn to press
levers
13 for drugs very quickly if it's the right drug. If
you
14 have a drug such as cocaine, within a few minutes
or a
15 few days, just by being in the box, the rats are
very
16 active, they move around, they explore, they'll
come in
17 contact with the lever. By chance they'll press
it
18 down. They will get their infusion of nicotine or
19 cocaine or variety of other drugs.
20 That association is created very quickly

21 where -- I don't know what a rat says to himself,
but 22 the association --
23 Q. If anything.
24 A. If anything. But pressing a lever, drug
25 injection, that happens very quickly, and the rat
is

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1 off and running.
2 Q. Okay.
3 A. Go ahead. I'm sorry.
4 Q. Okay. Another article by you and Dr. De
5 Noble, this one was in 1986: Brain Sites Involved
in 6 the Behavioral Effects of Intraventricularly
7 Administered Nicotine.
8 What was the thrust of that?
9 A. That was a study -- much of or work at
Philip 10 Morris was designed to try and locate where in the
11 brain nicotine was causing the effects.
12 And what we were doing there is putting
small 13 quantities of nicotine in a solution in the
different 14 parts of the brain and observing the effect on the
rat. 15 And what we were able to do is map out different
areas 16 and see which effects were particularly sensitive
to 17 nicotine injections and which ones were not
sensitive. 18 So ultimately it identified certain small areas in
the 19 brain where nicotine was acting.
20 Q. Then there was an article that you did
with 21 Dr. De Noble: Development of Behavioral Tolerance
22 Following Chronic Nicotine Administration.
23 And my question to you is, how do you
use the 24 term "behavioral tolerance" in this context when
25 applied to rats?

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1 A. Okay. That was a very complicated
study, but 2 basically tolerance is a characteristic of all
drugs of 3 abuse, whether it's cocaine or heroin or morphine
or 4 alcohol or amphetamine or nicotine, they all show
5 tolerance.
6 What is tolerance?
7 Tolerance essentially occurs when you
give a 8 drug and you produce an effect on behavior or on

the
9 cardiovascular system or on some other biochemical
10 measure, you give a drug, you produce an effect,
and
11 then you give that drug repeatedly, typically
every day
12 for a period of time. What you find is that
effect
13 will lessen, will go away, and if tolerance is
14 complete, you can no longer get the effect.
15 So over repeated exposure to that drug,
the
16 drug is no longer producing the effect you saw
17 initially. And what you have to do then to
recover the
18 effect is typically give a much higher dose. That
19 defines tolerance and, again, that's a
characteristic
20 of drug abuse, one of the defining
characteristics.
21 There are a lot of ways for tolerance to
22 occur. When you give a drug, you're altering the
body,
23 and the body doesn't like that. What the body
wants to
24 do is return to its normal state, its natural
state.
25 Well, the body is going to try and counteract the

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1 effects of the drug in many cases, and it can do
this
2 in several ways.
3 One thing the body can do is just try to
get
4 the drug out of the body faster, to flush it out,
5 metabolize it faster. So as it sees the drug
every
6 day, as you do those daily injections, one
possibility
7 is the metabolism will increase and remove the
drug
8 from the body quicker.
9 Another possibility which we're
particularly
10 interested in with behavioral tolerance is that
the
11 brain also will try and compensate for seeing that
drug
12 there on a regular basis, and the brain can alter
13 itself in several ways: It can change the areas
in the
14 brain that will -- where the drug latches on to,
where
15 the drug connects.
16 Other areas in the brain can become more
17 counteractive to counteract the effects of the
drug.
18 Basically the brain is going to try to counteract
or
19 compensate for the effect of the drug being there.

20 One way we measure these changes in the
brain
21 is by measuring behavioral characteristics or we
22 measure different behaviors of the rat. If you
believe
23 behavior is controlled by the brain, and that's
fairly
24 common, you can get an idea of brain changes by
25 measuring behavior.

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1 So we conducted a study that measured
both
2 types of tolerance I mentioned. One to measure
changes
3 in behavior, and one to measure changes in how the
body
4 tries to eliminate the drug that it sees on a
regular
5 basis.
6 Q. Okay. Now, let me focus in on your --
the
7 period of time that you were actually employed at
8 Philip Morris.
9 I believe you said you went to work
there in
10 November of '81.
11 A. Correct.
12 Q. And you left Philip Morris in December
of
13 '84?
14 A. Correct.
15 Q. Okay. Now, how did you get the job at
Philip
16 Morris in the first place? Was this something you
17 sought? Were you recruited or what?
18 A. I was at home. I was in Wisconsin at
that
19 point. I received a phone call early in the
morning.
20 I actually thought it was the Reagan people. The
21 elections were going on, and they were soliciting
22 votes. I thought it was the Reagan people calling
me
23 up, but it happened to be Vic De Noble. He said
he had
24 a position open at Philip Morris, asked me if I
was
25 interested in applying. I said yes, and it went
from

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1 there.
2 Q. Okay. De Noble is a colleague that you
knew
3 from Adelphi in New York?
4 A. Correct.
5 Q. Originally?
6 A. He was several years ahead of me in

graduate
7 school, yes.
8 Q. Okay. Just tell us in a general way the
9 process that you had to go through before it was a
done
10 deal that you became a Philip Morris employee.
11 A. I expressed an interest in talking to
Dr. De
12 Noble. They flew me to Richmond. I went through
a
13 series of interviews with the staff of a unit
called
14 the behavioral research unit which was the group
De
15 Noble worked in. And shortly after that, I
received an
16 offer.
17 Q. Now, in terms of the -- so in other
words,
18 you were being interviewed specifically for a
position
19 in the behavioral research unit?
20 A. In the behavioral research unit and
21 specifically in the behavioral pharmacology
laboratory
22 that had been established and was run by Dr. De
Noble.
23 Q. Okay. Before it was a done deal and you
were
24 hired, who interviewed -- give me the names of the
25 people who actually interviewed you.

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1 A. The head of the unit was Dr. William
Dunn.
2 He was my first and last interview of the day;
3 Mr. Frank Ryan, Dr. Frank Gulotta, Dr. Sandra
Dunn,
4 these were all investigators there in the
behavioral
5 research unit that worked under Bill Dunn.
6 Q. Once you were hired, in scientific
terms, in
7 your terms, you were a laboratory?
8 A. Correct.
9 Q. And you would describe it as behavioral
10 pharmacology laboratory?
11 A. Correct. Right.
12 Q. So, again, in practical terms, what was
in
13 the laboratory?
14 A. This was our standard rat lab. I mean,
it
15 had a series of -- it was a well-equipped lab.
Philip
16 Morris certainly was willing to support that type
of
17 research. It had approximately a dozen or 15
18 experimental chambers, 50 to 100 rats at any given
19 time, an expensive and complex series of control
20 equipment.

21 The studies we run are all controlled
22 automatically. Now they're run by computers.
Back
23 then computers were just coming into the labs,
where
24 basically you have a series of switches and
electrical
25 components that control what goes on in the

17726
1 experimental chamber. They can count every time a
rat
2 presses a lever. They can present different
stimuli to
3 rats, levels and tones, and they can deliver food
4 pellets to rats.
5 So it was a basic rat lab used for
studying
6 animal models of drugs.
7 Q. Okay. Now, Philip Morris, from an
outsider's
8 standpoint, Philip Morris is obviously in the
business
9 of manufacturing cigarettes?
10 A. Correct.
11 Q. And they've got this rat lab?
12 A. Right.
13 Q. And they've got scientists like you
working
14 in the rat lab?
15 A. Right.
16 Q. Why? What's the point?
17 A. The purpose of the lab -- well, the
purpose
18 of the lab was to study the behavioral
pharmacology of
19 nicotine and other tobacco smoke components.
There
20 were really two main goals: One was to identify,
21 working in concert with other Philip Morris
scientists,
22 a substitute for nicotine, something we called a
23 nicotine analog. It would be a molecule that
might be
24 related to nicotine but altered in some way.
25 It was our -- our primary job was to
study

17727
1 and evaluate these various analogs created by
Philip
2 Morris and see if we could identify one that had
two
3 characteristics.
4 One, they wanted to eliminate one of the
5 negative or adverse effects of nicotine, and that
6 referred to the cardiovascular effects. Back in
the
7 early '80s, there was great concern over the heart

rate
company
effects.
was
component
behavior.
saying
say
the
smoking,
there,
this
animal

8 and blood pressure effects of nicotine, and the
9 was interested in trying to eliminate those
10 At the same time, at Philip Morris it
11 well-understood that nicotine was the active
12 in cigarette smoke that maintained smoking
13 MR. HEIM: Objection, Your Honor.
14 THE COURT: I'm sorry?
15 MR. HEIM: I have an objection to him
16 what was well-understood at Philip Morris. He can
17 what he understood.
18 THE COURT: Overruled.
19 BY MR. ROSENBLATT:
20 Q. You can continue your answer.
21 A. It was well-understood that nicotine was
22 active component in tobacco that kept people
23 and the goal was to get a substitute nicotine in
24 again, that would maintain smoking but not have
25 negative effect on the heart. And we had our

17728
see
looking
brain?
objection.
the
you
criteria.
studying

1 models to try and screen numbers of compounds and
2 if we could identify one that met those criteria.
3 Q. In terms of the analog or substitute for
4 nicotine that you and the other scientists were
5 for, did one of the criteria have to be that the
6 substitute would have to have some impact on the
7 MR. HEIM: Objection, leading.
8 MR. MOSS: Leading, Your Honor.
9 THE COURT: I don't understand the
10 Do you want to talk about it at sidebar?
11 MR. HEIM: Okay. Sure.
12 (The following proceedings were had at
13 sidebar:)
14 THE COURT: The objection is what?
15 MR. HEIM: Simply that he was leading
16 witness. That was my objection. He said what did
17 understand --
18 THE COURT: Well, it can be leading
19 He is just focusing in on one area, which was
20 the effects of nicotine on the brain. So if

you're
the
wouldn't
this
point.
purpose, I

21 studying a substitute for effects of nicotine on
22 brain, I suppose that would be a criteria. We
23 have to worry about the rest. It's innocuous at
24
25 MR. HEIM: At this point, for that

17729
about
opinions
getting
isn't
lunch.
well
but --
if
series of
translated
and
result
witness, he
that.
were to

1 will withdraw the objection. But I'm concerned
2 opinions.
3 THE COURT: We haven't gotten to
4 yet.
5 Wait a minute. Gentlemen? We're
6 back into what is going to be known as the Carter
7 syndrome -- not the Carter syndrome. My brain
8 functioning either. I don't know what I had for
9 MR. MOSS: You and I ought to get along
10 today.
11 THE COURT: I was going to call it the
12 Clinton syndrome. It shouldn't be on the record
13 your definition of opinion is -- okay.
14 MR. HEIM: Let me give you an example.
15 THE COURT: The reason I bring this up,
16 he's doing scientific studies and they did a
17 studies and there was an end result that was
18 into a study document, are you claiming that's an
19 opinion that shouldn't be allowed?
20 MR. HEIM: No, no. If they did a study
21 he was part of that study and he knows what the
22 of that study was, I think that, as a fact
23 can testify to that. I don't have a problem with
24 Where I have a problem is where -- and I
25 don't want to anticipate testimony. But if he

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been

1 say, for example, and therefore, it would have
2 safer --
3 THE COURT: I see.
4 MR. HEIM: See what I mean? That's my

5 problem. But we didn't go there yet. So I --
6 THE COURT: Well, I'm interested in,
first of 7 all, the gathering of the data, the assimilation
of 8 that data or effect of that data on some other
aspect 9 is what you're talking about. We haven't gotten
there. 10
11 MR. HEIM: Right.
and 12 (The sidebar conference was concluded,
court:) 13 the following proceedings were held in open
14 BY MR. ROSENBLATT:
for 15 Q. In terms of the substitute or the analog
16 nicotine, was one of the criteria that you and the
substitute 17 other scientists were searching for was a
18 which would have some kind of impact on the brain?
19 A. Yes. It was certainly well-known that
eminent 20 nicotine acted on the brain. We had a very
Rochester 21 researcher, a colleague at the University of
22 named Leo Abood, who basically had spent his whole
nervous 23 career on how nicotine binds or latches on to
many 24 tissue, tissues such as in the brain. And he did
to 25 of those actual binding studies for us. He looked
bind. see where in the brain nicotine and analogs would

17731
like 1 One of the criteria was that it looked
bind 2 nicotine in terms of where in the brain it would
produced. 3 and the type of effects in brain tissue it
that 4 And that was just part of the program,
the 5 it acted in the brain and maintained behavior in
6 rats similar to nicotine.
7 Q. Now, when you talk about the laboratory
-- 8 first of all, where did these rats come from? How
does 9 the Philip Morris laboratory obtain these rats?
10 A. Like any animal lab, you buy laboratory
Spruce 11 animals from a supplier. Ours was from Blue
12 Farms in Altamont, New York, very reliable
supplier of 13 rats and mice to laboratories around the world.
They 14 are raised and bred in very carefully controlled

15 conditions so they are healthy, they come in
without
16 disease, you specify ages and sex and that sort of
17 thing. So it's a business.
18 Q. How big are these rats?
19 A. Physically?
20 Q. Yeah.
21 A. About that big (Indicating).
22 Q. Let the record reflect --
23 THE COURT: In terms of inches or feet?
24 A. We deal in terms of weight. I get the
rats
25 we worked with at 300 grams, less than half a
pound, if

17732
1 you don't count the tail. Most people don't like
that
2 long hairless tail. But you can find these rats
in a
3 lot of pet stores. We use the black and white
kind
4 instead of -- rather than the all white, the
albino
5 kind.
6 Q. Now, when you're observing these rats
and
7 they're involved in this whole exercise of
8 self-administration, is it the kind of setup where
20
9 or 40 rats are together, or is it individualized?
10 A. Each rat has its own experimental
chamber.
11 It's a small box about this big (indicating).
It's
12 made out of aluminum sheet and plastic,
plexiglass, so
13 it's easy to clean. You can observe the rat
through
14 the plastic door. He has a grid pan and drop pen.
15 These are pretty expensive.
16 But it's basically a metal and plastic
box
17 with levers and lights and speakers for presenting
18 tones and a little feeder that automatically will
19 present food pellets, and then a series of wires
that
20 go out into another room and are connected to the
21 control equipment to basically interact with the
rats
22 so that they live in these boxes 24 hours a day,
at
23 least in the self-administration studies, and we
would
24 observe them to clean and feed as needed.
25 Q. Now, the catheter that you describe
whereby

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1 the rat gets the infusion of the nicotine, is that
2 something that's permanently implanted into the
rat's
3 body?
4 A. Yes. Yes. We do the surgery. Dr. De
Noble,
5 my colleague, was very good at doing this. It's
very
6 tricky; rats have very small veins. It's very
hard to
7 get even a very small plastic tube into a vein.
You
8 suture it, you glue it using, again, standard
9 instruments as any surgeon would do. And once a
10 catheter is in place and the rat has had a few
days to
11 heal, those catheters can last anywhere from weeks
to
12 months.
13 So these were chronic preparations. The
rats
14 certainly, once implanted, were used in studies
for
15 long periods of time.
16 Q. Now, in terms of the self-administration
17 studies, in terms of food or water, did the rats
have
18 to press a lever to get food and water, or was
water
19 supplied to them?
20 A. We had a variety of types of studies,
21 depending upon what we were doing. And the basic
22 self-administration procedure, where the animal is
23 pressing a lever to obtain a squirt of nicotine
24 solution into his veins, we would feed those
animals
25 twice a day. We would simply give them a few food

17734
1 pellets in the morning and the evening. And they
2 always had a water bottle, so there was plenty of
water
3 to drink. It was a nice warm -- they were very
4 comfortable. And their job was to press the lever
for
5 nicotine.
6 In other studies we had rats simply
working
7 for food pellets. There was no catheter, no IV
8 administration of drugs, but we would train these
9 animals to perform tasks, reward them with food
10 pellets, then look and see how nicotine or analogs
or
11 other items of interest would modify that
behavior.
12 And there were studies where the rats had a choice
to
13 press a lever for food or nicotine, so they got to
do
14 both, and they were very good at it.
15 Q. And the rat was intelligent enough, if

they
16 wanted food, they pressed the right lever to food?
17 A. Rats are pretty smart. They learn
quickly.
18 When they're hungry, they learn where to go for
the
19 food. When they want their infusion of nicotine,
they
20 learn where to go for that. In most studies, we
would
21 give them different opportunities during the day
when
22 they could get one or the other, and we could
often
23 signify that with a light or tone. So they learn
24 pretty quickly what they have to do to get what
they
25 need.

17735
like
1 Q. Okay. So, again, if you were, you know,
you
2 with a friend of yours who was not a scientist and
you
3 explained generally your kind of work, what were
4 learning of value, to Philip Morris and to
yourself, as
5 a scientist in terms of these self-administration?
6 A. Well, again, self-administration was the
7 bedrock of the lab. That was Dr. De Noble's
particular
8 specialty. That's why he came in, to set that up.
9 A point about self-administration is if
a rat
10 will self-administer a drug, a human will
11 self-administer a drug. It's a very good
predictive
12 model. Rats are very -- there are drugs humans
will
13 self-administer that rats won't, like LSD. Rats
don't
14 like LSD and other hallucinogenics. But if you
look at
15 cocaine, heroin, morphine, amphetamine,
16 phencyclidine/PCP, essentially rats will
administer all
17 these drugs with the exception of some I noted.
18 So a rat is a conservative measure of
what a
19 human will do. If the rat will work for it, the
human
20 will work for it. I'm not aware of one drug that
a rat
21 will work for that a human will not.
22 Q. So, essentially, what kind of actual
23 scientific data were you collecting from these
24 experiments and then tell us of what practical use
this
25 data was.

17736

1 A. Well, our job is to set up this
2 self-administration model of nicotine. Philip
Morris
3 wanted us to be able to find a candidate compound
that
4 would substitute for nicotine.
5 So our goal was to find -- first set up
the
6 model to show that rats will self-administer
nicotine,
7 indicating that it has positively reinforcing
effects,
8 the rats will work for it. And once the rats were
9 doing that and telling us that they like it, in
quotes,
10 I mean, we would then use that as a model to
evaluate
11 these nicotine analogs, these other nicotine-like
12 compounds that the chemists at Philip Morris were
13 synthesizing.
14 We had a large group or very good group
of
15 organic chemists. We essentially were functioning
as a
16 drug company. We had organic chemists that were
17 upstairs in the research center making nicotine
18 analogs. They would send them down to us for
19 evaluation. It would go out to other labs such as
the
20 University of Rochester for evaluation, the whole
21 purpose being to identify nicotine analog that,
again,
22 maintained self-administration in the rats and
23 ultimately as an indication of maintaining smoking
24 behavior in people but did not have these negative
25 cardiovascular effects, did not have the effects
of

17737

1 increasing heart rate or increasing blood
pressure,
2 which were a concern at the time.
3 Q. Now, when you were employed at Philip
Morris
4 doing the kind of work that you've described, if
you
5 wanted to be totally up to date on whether other
6 researchers in your field or similar fields were
doing
7 the same kind of research, whether in New York or
8 Michigan or in Europe or anywhere, how would you
go
9 about obtaining that information to make sure that
you
10 were current?
11 A. Two basic ways: To read the literature,
all
12 good and current scientific literature is

attempted or
13 at least you attempt to publish it; and you attend
14 meetings where you can physically meet face to
face
15 with your colleagues and exchange and share
16 information.
17 Q. At Philip Morris, what was an article
request
18 form?
19 A. An article request form would have been
from
20 the library, a small card where, if you needed an
21 article from a professional journal and Philip
Morris
22 did not have that journal, you would put in a
request
23 for a library to go and obtain it from another
library.
24 Q. And what was usually the lapse of time,
if
25 Philip Morris did not have the particular journal
on

17738
1 its premises, if you filled out one of those
article
2 request forms, how long of a delay before you
actually
3 got the article?
4 A. Well, it wasn't long. A couple weeks
maybe
5 at the most. Sometimes less, sometimes more.
6 Q. To your knowledge, while you were at
Philip
7 Morris, did the Philip Morris scientists monitor
the
8 worldwide literature relative to nicotine and
other
9 smoke compounds?
10 A. Well, we certainly monitored the
literature
11 on our own area. The people in the behavioral
research
12 unit, I think, were very competent, up to date.
In
13 order to keep your research up to date and fresh
and
14 current, you have to know what other people are
doing.
15 And in general, the Philip Morris
library was
16 very good at bringing in the recent literature
that
17 would be relevant to smoking, smoking and health,
18 nicotine. And we also had some people working in
19 the -- with one of our directors, Dr. Osdene, a
woman
20 named Judy John, spent a good part of her time
doing
21 literature searches to find out what was being
done

22 around the world in different laboratories.
23 Q. Now, you mentioned, I guess, in another
24 department of Philip Morris there were organic
25 chemists, and their focus was what in relation to
what

17739
1 you were doing?
2 A. The organic chemists' main job was to
create
3 analogs. A good --
4 Q. Substitutes for nicotine?
5 A. Substitutes for nicotine. A good
organic
6 chemist can take a parent molecule such as a
nicotine
7 molecule, and in their test tubes, manipulate that
8 molecule. They can take things off, bend it and
twist
9 it, so come up with a second and third generation
10 compound. Very standard type of procedure that
any one
11 of the major drug companies would do to create new
12 drugs for their uses.
13 Q. When you were at Philip Morris, how
would you
14 relate the level of scientific sophistication and
15 technology at Philip Morris when compared with a
really
16 first-rate drug company or chemical company
located
17 elsewhere?
18 MR. HEIM: Objection. Elsewhere, it's
19 speculation.
20 MR. MOSS: That's opinion.
21 (The following proceedings were had at
22 sidebar:)
23 THE COURT: He can answer the question
based
24 on his experience in the laboratory, which was
25 determined to be, in his mind, first rate. My

17740
1 understanding was he thought this one was a first
rate.
2 MR. MOSS: He already said that. Now
he's
3 asking him to compare it to a drug company.
4 MR. HEIM: And he's never worked in a
drug
5 company. He has no --
6 MR. ROSENBLATT: No, but I think he
could
7 tell by requests that he got and --
8 THE COURT: Okay. The thrust of the
question
9 was it was a great lab or a poor lab.
10 MR. ROSENBLATT: The thrust of my
question

11 was Philip Morris was way ahead of everyone else.
12 THE COURT: Okay. What's wrong with
that?
13 MR. ROSENBLATT: Why am I so honest?
14 MR. HEIM: I don't have a problem with
that.
15 I have a problem with him comparing it to drug
company
16 laboratories. That's not what it was, and he
doesn't
17 know anything about them.
18 MR. MOSS: Nor does he have any
experience,
19 nor has there been any foundation, and now you're
20 getting into expert opinion.
21 MR. HEIM: The question can be asked in
a way
22 to get the information he wants without --
23 THE COURT: Rephrase the question. If
your
24 thrust is to make known that they had all the
25 facilities and more than most and all of that,
they

17741
that
1 were doing great work, that's wonderful. Do it
2 way. Okay?
3 (The sidebar conference was concluded,
and
4 the following proceedings were held in open
court:)
5 BY MR. ROSENBLATT:
6 Q. In terms of the level of sophistication
at
7 Philip Morris, scientific sophistication in your
area,
8 organic chemistry, how would you rate it?
9 A. I think Philip Morris had a very top-
notch
10 research center. Being very modest, I mean, I
think I
11 was a competent researcher, I liked what I did, I
12 studied hard. Vic De Noble, I thought, was an
13 excellent researcher.
14 In terms of our organic chemists, they
15 certainly had no trouble cranking out nicotine
analogs.
16 These guys were working magic in their labs. In
fact,
17 they would go to meetings and come back, they
would
18 talk to other chemists and chuckle and indicate to
me
19 on several occasions that Philip Morris was years
20 ahead, ten years ahead of anybody else out there
that
21 was studying nicotine as a molecule.
22 Q. Did Philip Morris, in your department
and
23 other departments that you were familiar with on a

24 first-hand basis, have very up-to-date, modern,
25 scientific equipment?

17742

1 A. Well, ours was state-of-the-art at the
time,
2 and I don't order chemistry equipment, but I have
no
3 doubt that theirs was also state-of-the-art.
4 Q. Now, were there, in fact, periodic
nicotine
5 analog meetings?
6 A. Yes, these --
7 Q. And you would attend these meetings?
8 A. Correct.
9 Q. How often were they held, about?
10 A. They could be once a month, every couple
11 weeks, depending upon how much new data was
collected
12 and what was the issues to be discussed. But
monthly
13 at least.
14 Q. Now, you started there in '81; and where
was
15 your research leading? I mean, had you developed
16 analogs that could be developed commercially?
17 A. Well, when I started there in '81, the
lab
18 had been in existence for over a year, a year and
a
19 half, close to two years. Actually, the lab had
20 existed for some time prior to my arrival on a
very
21 small scale, and it was run by Carolyn Levy, who
is now
22 with upper management in New York in Philip
Morris.
23 Vic De Noble came in about a year and a half
before I
24 did with the mandate to expand the lab and start
25 examining analogs on a larger scale.

17743

1 So when I got there, the lab was quite
large
2 and active and up and running. The self-
administration
3 model had been established by Dr. De Noble. He
was
4 running a number of other studies. And I
proceeded
5 then to start a number of studies also.
6 Q. And were you able, before you left
Philip
7 Morris, to say that our research has proven such
and
8 such or established such and such?
9 A. We examined a number of analogs. What
would

they 10 happen is, as the chemists synthesized an analog,
11 would send it down to us and to other people for
12 testing.
13 So over the two and a half years that I
was 14 in the lab there, we tested probably close to 100
or 15 more compounds, and several of these seemed to
meet the 16 criteria that Philip Morris wanted, in that the
analogs 17 maintained self-administration in the rats in an
amount 18 equivalent to or greater than nicotine, and as
reported 19 by one of our colleagues, Dr. Abood of Rochester,
had 20 fewer cardiovascular effects than nicotine. So
that 21 seemed to be the compound or two candidates for
the 22 compound they were looking for.
23 Q. All right. You tested a lot of analogs
as 24 you've described. So what happened after that?
25 A. I'm not sure what you're asking.

17744
analog 1 Q. Well, in terms of was there ever an
as a 2 selected that was used in a commercial cigarette
3 substitute for nicotine?
4 A. The --
5 Q. I'm trying to find out where, if
anywhere, 6 the research program, the analogs went in
practical 7 terms.
8 A. The two most promising compounds, 2-
prime 9 methylnicotine and 4-prime methylnicotine, were
10 identified and agreed upon by the analog group as
being 11 the most promising. Over these meetings, there
were a 12 lot of discussions on if and when we identified
one, 13 what actually would we do with it, how would
Philip 14 Morris, how would they get it into a cigarette?
15 There were issues of regulatory concern
with 16 the FDA, when would they get it in, would they put
it 17 in with nicotine and take nicotine out gradually?
18 There were a lot of these issues that came up.
But I'm 19 not aware that the analog was actually ever put
into a

20 commercial product.
21 Q. Now, did there come a time when the
22 laboratory was closed?
23 A. Yes.
24 Q. So describe the events leading up to
that,
25 the closing of the laboratory.

17745
1 A. I got there in November of 1981. The
2 laboratory was closed in April of 1984.
3 For the first year and a half I was
there,
4 work proceeded relatively smoothly. I would like
to
5 say this was a very sensitive lab at the research
6 center, very secret. We were allowed to have very
few
7 visitors.
8 When we ordered our rats, they were
often
9 wheeled up to the lab on a cart under a sheet so
nobody
10 could see them.
11 We did very few presentations. In fact,
for
12 the first year, no presentations to the research
center
13 as a whole. Our annual reports had a very
restricted
14 distribution.
15 The people we interacted with for the
most
16 part were Dr. Dunn and then Dr. Jim Charles and
17 Dr. Thomas Osdene being the chain of command that
18 oversaw our laboratory.
19 There came a time in 1983 where there
was
20 great concern on the company for pending
litigation
21 against Philip Morris.
22 MR. HEIM: Objection, Your Honor. It's
a
23 conclusion.
24 Can we approach, Your Honor?
25 THE COURT: Yes.

17746
1 (The following proceedings were had at
2 sidebar:)
3 MR. HEIM: In a long narrative answer to
a
4 simple question, it's hard to weed out what is
fact and
5 what is just opinion. But when he says the
company was
6 very much concerned, that strikes me as his
opinion and
7 not necessarily a fact statement.

8 THE COURT: Unless it was communicated
to
9 him.
10 MR. HEIM: Unless it was communicated to
him
11 by someone who -- it would not be hearsay.
12 MR. ROSENBLATT: It was.
13 MR. MOSS: A problem we have here is
this:
14 We all agree that he is a fact witness. We
established
15 that early on. With fact witnesses, you certainly
16 don't have a question and have them give you a
long
17 narrative answer, because what is going to happen
is
18 what exactly just did happen; that is, we're going
to
19 get into areas where he probably is not allowed to
20 testify.
21 So why don't we do it in a question and
22 answer format rather than what he wants to say?
23 THE COURT: I'm not exactly sure where
you're
24 going, but I suppose that what you expect him to
say is
25 that they eventually decided to send all animal
studies

17747
1 overseas. Is that the end result of this thing?
2 MR. ROSENBLATT: No. They killed the
rats.
3 They closed the laboratory and killed the rats.
4 MR. HEIM: No, Stan's right. Where he's
5 going is they shut the laboratory down.
6 MR. ROSENBLATT: Shut it down and
basically
7 fired him.
8 THE COURT: You want to know why?
9 MR. ROSENBLATT: Exactly.
10 THE COURT: So the question is the why,
and
11 the answer to that was why? Why did they do that?
12 MR. ROSENBLATT: That's what I'm going
to ask
13 him.
14 THE COURT: What do you think he's going
to
15 say?
16 MR. ROSENBLATT: Because they were
getting
17 too hot in terms of their research. They were
very
18 worried about what -- that their data would be
19 discoverable in litigation.
20 THE COURT: Okay. Now that gets into
that
21 probative area.
22 MR. MOSS: Exactly.
23 THE COURT: There had been previous

testimony

24 that experimental studies on living animals were
25 shifted overseas. That was some earlier study.

Is

17748

1 that part of this situation, or is it something
2 different?

3 MR. DOUGLAS: That was under
consideration.

4 It was one of the things that was discussed
leading up

5 to the shutting down of the lab whether --

6 MR. MOSS: Hold on. The witness is
hearing

7 everything you're saying. He's not supposed to be
8 listening.

9 THE COURT: The question is, what did he
do,

10 what part did he play in that? If he was just a
11 soldier in the field and the generals have to come

in
12 and talk about it, all he can say is, I was there

one
13 day, I received information regarding the shut-

down.
14 Now, if he received information such as

a
15 memo of some sort as to why they were shutting it

down,
16 that's a different story. You will have to go

into
17 that.

18 MR. DOUGLAS: Judge, it was a process
which

19 actually took several months which involved visits

from
20 executives to the lab. But the principal

scientist,
21 they discussed it directly.

22 THE COURT: But was it relayed to him?
Was

23 he part of the discussion?

24 MR. DOUGLAS: Yes. He was involved in
25 discussions, and it let up to the closing of the

lab.

17749

1 THE COURT: He would have factual
2 information.

3 MR. DOUGLAS: That's correct. First-
hand

4 discussion.

5 MR. MOSS: Whoa, whoa.

6 MR. HEIM: Depends on actually where he
got

7 the information from. Now he's testified in his
8 deposition what was told to him as to why the lab

was

9 shut down, and he obviously will testify as to
what was
10 told to him.
11 When he asked the question -- when he
asked
12 the question of not the president, I'm sorry,
whatever
13 Charles was, he asked him why is the lab being
shut
14 down, he answered it was being shut down for
business
15 reasons.
16 MR. DOUGLAS: It included the president
and
17 CEO of Philip Morris that visited the lab to
inquire
18 what they were doing, and that was part of the
process
19 that actually led to the decision to close it.
20 THE COURT: You can make various
suppositions
21 from a series of facts. We're interested in not
the
22 suppositions but the facts. So we have to know
what
23 fact 1, fact 2, 3, 4 was and not worry about what
the
24 supposition was. I don't know what his position
is.
25 If he can give you the facts leading up
to

17750
1 the shut-down, fine. But as to explain the theory
2 behind it and the scuttlebutt that these people
may
3 have discussed in the lab as to why this was
occurring,
4 that's not fact. So I don't know where he's going
at
5 this point.
6 MR. DOUGLAS: What he can testify to,
Judge,
7 is that he was told directly, in very explicit
terms by
8 the directors who were overseeing the lab, the
reasons
9 for the lab being closed when it was and the
manner in
10 which it was closed.
11 THE COURT: So this was made known to
him by
12 the supervisor.
13 MR. DOUGLAS: Yes, it was, including Dr.
De
14 Noble, who was his supervisor. That's what this
is
15 leading up to, I believe.
16 MR. HEIM: Well, I don't know whether he
will
17 say that. My recollection of his deposition

testimony
18 is that he was told -- he specifically --
19 THE COURT: Let's find out what his
answer is
20 going to be.
21 MR. HEIM: But I think there's a hearsay
22 component here that we're concerned about. I
guess
23 we'll just have to hear what he says.
24 THE COURT: Yes.
25 (The sidebar conference was concluded,
and

17751
1 the following proceedings were held in open
court:)
2 THE COURT: Hold on.
3 (The following proceedings were had at
4 sidebar:)
5 THE COURT: There are two people sitting
in
6 the second row behind Mr. Rosenblatt's seat. One
is in
7 a dark shirt. Another is in a sort of brownish
plaid
8 shirt. I noticed during the conversation they got
up
9 and were leaning over and reading from your
computer.
10 MS. LUTHER: They are attorneys for the
11 defendants.
12 THE COURT: I don't know who they are.
13 MR. DOUGLAS: They are counsel
representing
14 Philip Morris from Arnold & Porter in Washington,
D.C.,
15 so apparently they decided --
16 THE COURT: I got counsel. Now I got a
17 reporter.
18 MR. DOUGLAS: No. Counsel representing
19 Philip Morris, they're with Arnold & Porter, a law
firm
20 in Washington.
21 THE COURT: I was concerned with who
they
22 were.
23 MR. HEIM: They're lawyers.
24 THE COURT: They are entitled to look at
--
25 MR. MOSS: They want to see what the

17752
1 transcript --
2 THE COURT: I have no problem with that.
3 MR. ROSENBLATT: I do. Let them look at
4 their screen.
5 MS. LUTHER: They weren't looking at
yours,
6 Stanley.

7 MR. ROSENBLATT: I'm kidding.
8 THE COURT: I noticed. I didn't know if
they
9 were civilians.
10 MR. MOSS: They just read what we were
11 talking about and moved back.
12 (The sidebar conference was concluded,
and
13 the following proceedings were held in open
court:)
14 THE COURT: All right. Let's proceed.
15 BY MR. ROSENBLATT:
16 Q. All right. At some point while you were
17 employed at Philip Morris, the rat laboratory was
18 closed, correct?
19 A. Correct.
20 Q. And obviously you asked why that was
21 happening.
22 A. Correct.
23 Q. What were you told -- who did you ask
and
24 what were you told as to why your laboratory, Dr.
De
25 Noble's laboratory, was being closed?

17753
'84
immediate
were
1 A. I was given that information in April of
2 by Dr. Jim Charles, who was Dr. De Noble's
3 supervisor, that the lab was being closed. We
4 told it was a business decision.
5 MR. HEIM: Object to hearsay grounds.
6 THE COURT: Overruled.
7 Keep going.
8 A. (Continuing) I was told directly by
9 Dr. Charles the lab was being closed. When I
asked
10 why, I was told it was a business decision. This
was
11 really the culmination of a series of events for
the
12 last six or nine months where the lab was in
question.
13 There were -- there were several times it came up
in
14 the previous six to nine months that the lab might
be
15 closed.
16 We were finally told it was to be
closed. We
17 were told the next day: Turn off your equipment,
kill
18 your rats, pack up your offices. And that's what
we
19 did.
20 Q. Based on the period of time that you
worked
21 there in the rat laboratory, and Jim Charles was
your

22 immediate supervisor -- well, De Noble was your
23 immediate?
24 A. Yeah. I answered to De Noble. De Noble
25 answered to Charles.

17754

1 Q. Okay. When Charles answered your
question
2 and told you that the laboratory was being closed,
that
3 this was a business decision, did you understand
what
4 he meant?

5 A. No. Well, I got no further explanation,
6 although it had been clear in discussions with Jim
7 Charles directly and Dr. Osdene and Dr. De Noble
for

8 several months before that, that there was great
9 concern that the work we were doing was causing --

10 MR. HEIM: Objection, Your Honor.

11 A. -- a legal liability.

12 THE COURT: Just leave it at that.

13 MR. ROSENBLATT: Okay.

14 BY MR. ROSENBLATT:

15 Q. Now, you referred to this six or nine-
month
16 period before April of '84 when you got some
indication
17 the lab might be closed. In terms of specific
events
18 or anyone coming to the lab during that time frame
the
19 six or nine months before, what happened?

20 A. We had several visitors. In or around
mid
21 '83, we had a series of outside attorneys come
from the
22 firm of Shook, Hardy & Bacon in Kansas City. We
were
23 told that these attorneys --
24 MR. MOSS: Objection, Your Honor.
25 MR. HEIM: Objection.

17755

1 THE COURT: I guess we're going to have
to --
2 why don't you folks go in the jury room?
3 (The jurors exited the courtroom.)
4 THE COURT: All right. Have a seat,
folks.

5 I guess we better find out where we're going
before we
6 get in front of the jury with this issue.

7 VOIR DIRE EXAMINATION

8 BY MR. ROSENBLATT:

9 Q. Okay. This is what's known as kind of a
10 proffer, so I'm going to be asking you some
questions.
11 Just give the same answers you would have given if

the
12 jury was here.
13 I had asked you about the events within
the
14 six or nine-month time frame before the actual
closing
15 of the lab, what you had actually seen or heard
about
16 the possible closing of the lab, and you were in
the
17 process of answering that.
18 A. Well, in mid '83 we were visited by a
series
19 of lawyers from Shook, Hardy & Bacon in Kansas
City,
20 and were told by Dr. Charles that, because they
would
21 be representing Philip Morris in some pending
lawsuits,
22 they were coming down to examine the lab, find out
what
23 we did, find out what our results were, for that
24 defense.
25 That led to questions on whether the lab

17756
that
1 should continue to be open. And in November of
Pollack,
2 year, the president of the company, Mr. Shep
several
3 with one of his attorneys, Fred Newman, and
lab, had
4 other people, came down firsthand to visit the
5 a tour of the lab, talked to us, again with the
6 understanding, as we were told directly, that they
were
7 going to decide whether the lab should stay open
or be
8 closed.
9 After they left, shortly around the
first of
10 the year, we were told that everything was okay,
keep
11 working. And then several months after that, very
12 suddenly we were told the lab was -- the work was
no
13 longer to continue and we were to close the lab.
14 THE COURT: Okay.
15 BY MR. ROSENBLATT:
16 Q. Well, this is obviously a scientific
17 laboratory. Did anyone give you an understanding
as to
18 why the lawyers were going through the rat
laboratory
19 and why the president of Philip Morris came from
New
20 York and he was personally going through the rat
21 laboratory?
22 A. Well, the work we were doing we were
told

in 23 posed a potential legal liability for the company
very 24 the lawsuit, the Cipollone case, that had become
evaluate 25 prominent in mid '83, and that they had to

17757

1 whether this work should continue to go on or not.
2 Q. And without taking every event during
that 3 six or nine-month time frame, when the lab
actually was 4 closed and you were told that it was a business
5 decision to close the laboratory, what did that
mean to 6 you, based on all your experiences of the previous
nine 7 months --
8 A. Well --
9 Q. -- relating to the possible closing of
the 10 lab?
11 A. It was obvious to me they were closing
it 12 because they were afraid of the work, and they
didn't 13 want it to continue anymore. It certainly was not
an 14 expensive lab to run.
15 Q. Was there any scientific reason that you
were 16 aware of for closing the lab?
17 A. None. We had both been promoted. We
had 18 both gotten great praise from the company,
probably 19 more than I would have given us. I thought we did
a 20 good job. They were very happy with the work. We
21 identified the analogs they wanted. We identified
22 other materials in smoke that were of very much
23 interest to the company. So, scientifically,
there was 24 no reason that I was made aware of that there were
any 25 problem. We did our job.

17758

1 THE COURT: Thank you.
2 Your objections, sir?
3 MR. HEIM: Yes, Your Honor, several
4 objections to it.
5 Do you want to excuse the witness or do
you 6 want to do it sidebar?
7 THE COURT: No. You can just step out
in the 8 hall, if you would for just a minute.

9 (The witness exited the courtroom.)
10 MR. HEIM: Judge, what you have here is
a whole bunch of speculation and opinion as to what
is happening. He said some lawyers showed up from a
law firm. He draws a conclusion from lawyers showing
up. Who knows what else, other things they were doing
at the company. Nobody. He doesn't.
16 He's only got a little picture of this
thing. He said it led to questions, recontinuing the lab.
The president of the company comes through, has a
18 discussion with him, and then they're told the lab
19 should stay open.
20 According to what he said, I wrote down,
21 "Everything okay." And he says several months
later it's closed, and then he draws the conclusion --
he was told for business reasons, and he draws the
conclusion:
25 "It's obvious to me they were afraid of the work."

17759
1 Well, that is pure conclusory
speculation as
2 to his conclusion. It has no -- it's just his
opinion
3 that that was the reason, when he gets to, "It's
4 obvious to me that they were afraid of the work."
5 So this suggestion that there was a
concern
6 about legal liability, as he put it, just kind of
7 wanders around out there, but it doesn't have a
8 foundation in admissible evidence. There is no
9 foundation for it.
10 And for him to then jump to the
conclusion
11 that business decision equals legal liability I
think
12 is unwarranted. It's not supported, and doesn't
have
13 foundation.
14 THE COURT: Well, part of his answer is
not
15 okay. I mean, we can understand that, and I can
easily
16 identify that. Part of his answer is open to
question
17 at this point.
18 You want to respond to that? In other
words,
19 he came down and said that the lawyers came down
and
20 they wanted to look at the lab because they were
21 interested in the case they were doing. That's

really
some
purposes
wrong
22 not a problem, basically. And then they were told
23 higher-ups came down and decided for business
24 they were going to close the lab. Really nothing
25 with that. Okay?

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anything
think
an
scientific
business
problem
the
were
particular
have
of
those
lawyers
by
Philip
to
what
area
that
become
1 Any supposition on his part as to
2 else getting too close to something or other I
3 would be objectionable.
4 The question you asked I think would be
5 appropriate question as to was there any
6 reason why the lab should close, vis-a-vis a
7 reason. That's no problem. I don't find any
8 with that.
9 But any supposition that he may make on
10 area of what the lab was doing and whether they
11 afraid that they were getting close to a
12 area or subject matter, I think all of that is
13 speculation and supposition of which he doesn't
14 any direct knowledge.
15 But let me just start again from the top
16 what he stated and get that area and identify
17 areas which I think would be inadmissible.
18 See, it starts when he first said the
19 from Shook, Hardy & Bacon came down and were told
20 Dr. Charles because they would be representing
21 Morris in some pending lawsuit, they were coming
22 examine the lab, find out what they did, find out
23 the results were for the defense. That's got some
24 of discussion he can talk about. But if he says
25 the lawyers came down to look over the lab, to

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1 educated for whatever reason, that's one thing.
2 Then that leads to the question whether

the
lab,
may
told
close
objectionable
what
posed
it
your
obvious
of
the
question.
appropriate.

3 lab will continue to stay open or not. That's no
4 problem. President comes down, and he visits the
5 talked with everybody, then they were told they
6 decide whether to close the lab or not. Then they
7 left. He was working. Several months later they
8 me we weren't going to work anymore, continue to
9 the lab down.
10 Then the next question is the
11 question, I think: Did anyone give you an
12 understanding as to why the lawyers were doing
13 they were doing and so forth?
14 He says: Well, the work we were doing
15 a potential legal liability for the company in a
16 lawsuit, and I think that would be objectionable.
17 Getting beyond that, another question -- what did
18 mean to you based upon closing the lab, based on
19 experiences? And this is when he says it was
20 that they were closing it because they were afraid
21 the works and didn't want it to continue. That's
22 supposition.
23 The next question was, was there any
24 scientific reason, which was an appropriate
25 So, within that framework, I think it's
appropriate.

17762

1 MR. MOSS: May I make a suggestion? I
2 understand your ruling, and I'm not arguing with
it.
3 But I think that, in order to be sure we don't get
into
4 a problem --
5 THE COURT: I've got to talk to him
first.
6 MR. MOSS: Exactly.
7 MR. HEIM: That's what I was going to
8 suggest.
9 THE COURT: Do you want to change sides?
You
10 come up here, I'll go down there?
11 MR. MOSS: Yes. How about maybe just a
12 couple of hours?
13 THE COURT: One or two rulings?
14 MR. MOSS: Yes.
15 MR. KIRBY: Wouldn't take me that long.
16 THE COURT: Only one. I'm just kidding.
17 MR. ROSENBLATT: You want the witness?

18 THE COURT: Yes.
19 (The witness entered the courtroom.)
20 THE COURT: Okay. The reason I've got
you
21 back here without the jury is we had to go over
some of
22 the legal aspects of this. You're a scientist,
not a
23 lawyer, and I'm not a scientist. We had to get to
some
24 understanding.
25 It's okay for you to testify that some
of the

17763
1 attorneys came down to check the lab out and see
what
2 you were doing, so forth and so on. But the
reasons
3 for them coming down I think would be
inappropriate to
4 discuss. But the fact that they did come down,
looked
5 it over, the president coming down and him looking
it
6 over and deciding whether you may or may not close
the
7 lab, that's okay. No problem.
8 The supposition as to what's really
behind it
9 all I think is inappropriate, and you can't
discuss
10 what you believe would have been the real reason.
He
11 said it was a business reason, that was relayed to
you,
12 that's fine. You can testify as to that. But I
would
13 stay away from this idea that you said you thought
they
14 thought it was apparent they were getting too
close to
15 something which would cause a problem for the
company.
16 THE WITNESS: Let me clarify. Just as -
- he
17 told me it was a business decision. Prior to
that, in
18 mid '83, we were told that there was concern on
the
19 company that we were a liability. I didn't think
that;
20 I was told that.
21 THE COURT: Well, I understand that.
But
22 that gets into a legal question of legal
23 responsibilities, and that's where we're at.
That's
24 different than science. So we have that
restriction.
25 The next question was asked of you: Was

17764
1 there any scientific reason for the lab being shut
2 down? That's an appropriate question. You can
answer
3 that.
4 So, within that parameter. Just stay
away
5 from the legalese issue.
6 THE WITNESS: Sounds good.
7 THE COURT: All right. Bring the jury
in.
8 It's very difficult.
9 THE WITNESS: If I get out of line, just
10 whack me.
11 (The jurors entered the courtroom.)
12 THE COURT: All right, folks. Please be
13 seated. You may resume.
14 DIRECT EXAMINATION (Continued)
15 BY MR. ROSENBLATT:
16 Q. You know, Dr. Mele, in terms of your
being
17 told the lab was closed for business reasons, let
me
18 ask you this: From your standpoint, was there any
19 valid scientific reason to close the lab?
20 A. We were never given any reason
scientifically
21 why the lab should not continue. There was never
22 anything but the highest regard for the lab and
the
23 work at Philip Morris.
24 Q. At the time the lab was closed in April
of
25 '84, had you completed your research?

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1 A. No. We had a number of projects
ongoing. We
2 had completed some studies. We were in the middle
of
3 others. And we were about to start yet another
series.
4 One study often leads to another. There are many
5 questions to be asked.
6 We had identified two candidate analogs
that
7 the company had asked us to look for, but there
were
8 clearly a number of other issues they asked us to
9 pursue, and those answers had not been completed.
10 Those studies were not finished.
11 Q. Did you say that, during the six or nine
12 months' time frame before the lab was actually
closed
13 in April of '84, that the president of Philip
Morris
14 came down to Richmond and went through the lab?
15 A. That is correct. Mr. Shep Pollack, head

of
16 Philip Morris, USA.
17 Q. Did he come alone?
18 A. He came with a small entourage. One of
the
19 corporate attorneys, Mr. Fred Newman, who was the
20 attorney in our chain, he reviewed and evaluated
all of
21 our work, our written reports; and then there were
22 several other people from New York, I don't
remember
23 who.
24 Q. When the president of Philip Morris was
in
25 the laboratory, did you have any direct discussion
with

17766
1 him?
2 A. Yes.
3 Q. Tell us what he said to you, what you
said to
4 him.
5 A. Mr. Pollack and Mr. Newman and the other
6 groups had took a tour of the lab. They wanted to
see
7 the rats working in the box, so they got to see a
rat
8 self-administering nicotine. The lab is composed
of a
9 series of rooms that are interconnected.
10 When we were out in one of the main
rooms, I
11 was there with Mr. Pollack and several other
people,
12 and he asked -- he asked -- I don't remember the
exact
13 words -- either is nicotine or is cigarette
smoking
14 addicting.
15 Q. Did you answer him?
16 A. The answer I gave was that -- there was
a lot
17 of work that needed to be done to address that
question
18 on nicotine. We had answered some of the
questions
19 from our work with self-administration and our
20 tolerance studies. We felt we needed to do more
work,
21 we had other work in progress, and -- we felt the
work
22 needed to continue to address that more directly.
23 Q. When the president of the company left
on
24 that particular day, did he say one way or the
other
25 whether the lab was going to be closed or whether
it

17767
1 would remain open?
2 A. He didn't say anything to me. The
feedback 3 we got shortly --
4 MR. MOSS: Objection, Your Honor.
5 THE COURT: Sustained.
6 BY MR. ROSENBLATT:
7 Q. Now, I believe you had mentioned at some
8 point during the several months prior to the
actual 9 closing, Philip Morris lawyers from the law firm
of 10 Shook, Hardy & Bacon came to visit the lab?
11 A. Correct.
12 Q. Did you have any direct interaction with
13 them?
14 A. Yes. Quite a bit.
15 Q. Tell us about it.
16 MR. MOSS: Your Honor, may we go
sidebar?
17 THE COURT: Yes. I guess we're going to
have 18 to.
19 (The following proceedings were had at
20 sidebar:)
21 MR. MOSS: Now, this is exactly the area
that 22 you instructed him and opposing counsel not to go
into,
23 as to the liability part of it. I just looked at
the 24 transcript again as to what you said.
25 THE COURT: Yes. I'm sure we understand

17768
1 that. So does Mr. Rosenblatt. But I'm taking it
and 2 making an assumption that he's not going to go
into 3 that area, but something else. Maybe I'm wrong.
4 MR. MOSS: Once again, I could be wrong.
5 MR. ROSENBLATT: They were -- we want to
know 6 what did they do, what did they do, what did they
say 7 to you?
8 THE COURT: Well --
9 MR. ROSENBLATT: I don't expect I'm
going to 10 get this answer. But if someone -- I would think
that 11 if someone from Shook Hardy said to him, well,
we're 12 worried about litigation, which I don't expect him
to 13 say, he would be entitled to say that.
14 MR. HEIM: It would be hearsay what
outside 15 lawyers would say, and may even be privileged. I

don't

16 know.

17 MR. MOSS: If we're going to do this, I
18 thought you were clear in that we weren't going to

do

19 this.

is

20 THE COURT: I don't know what his answer
21 going to be.

22 MR. MOSS: And we need to hear what he's
23 going to say. I hate to have the jury leave, but

they

24 MR. ROSENBLATT: I won't ask him what

what

25 said. I won't ask him. But I'm going to ask him

17769

1 he saw them do and how long they hung around.

2 THE COURT: That's fine. Okay.

and

3 (The sidebar conference was concluded,

court:)

4 the following proceedings were held in open

5 BY MR. ROSENBLATT:

Shook

6 Q. Don't tell me what the lawyers from

7 Hardy said, if anything.

8 What did you see them do, if anything?

9 A. They came in --

10 Q. In the laboratory?

11 A. The lawyers saw the lab, they saw the
12 animals, they saw our offices, they saw all our

files,

13 they saw the literature we read, they saw the data

we

14 collected, they saw the reports we wrote.

15 Q. They reviewed everything?

16 A. Correct.

17 Q. To your knowledge, did any one of those
18 lawyers have a scientific background?

19 MR. MOSS: Objection, Your Honor.

20 THE COURT: If he knows.

21 A. I don't know.

22 Q. They were lawyers, as far as you knew?

asked a

23 MR. MOSS: Objection, Your Honor. He

24 question and he doesn't like the answer and --

25 MR. ROSENBLATT: I loved the answer.

17770

1 MR. MOSS: He said they were lawyers --

2 THE COURT: He doesn't know if they had

a

3 scientific background, but he does know they're
4 lawyers.

5 MR. MOSS: That's been established a

long

6 time ago.

7 THE COURT: The only reason he knows
they're 8 lawyers is because they told him.
9 MR. HEIM: If they're lawyers, they
probably 10 don't have any scientific background; that's why
11 they're lawyers.
12 THE COURT: So the lawyers without
scientific 13 background came to talk to you?
14 BY MR. ROSENBLATT:
15 Q. And how long did the lawyers who had no
16 scientific background hang around?
17 A. The lawyers with no scientific -- well -
- 18 THE COURT: They hung around, they --
19 Q. But how long did they hang around?
20 A. Months.
21 Q. Months? You mean on a daily basis?
22 A. There were one or two of the attorneys
and 23 one in particular we saw almost daily for several
24 weeks. They would come and go. They would leave
25 Richmond, go back to Kansas City and come back to

17771
out. 1 Richmond. But they were there when we were kicked
of 2 So from beginning in mid June -- mid '83 to April
3 '84, they were there.
4 Q. And basically doing what? What you've
5 already told us about, reviewing files and that
kind of 6 thing?
7 A. Correct.
8 Q. Again, don't tell me what was said. I
just 9 want to know if you ever asked these lawyers, you
know: 10 This is a scientific laboratory. What's going on?
Why 11 are you guys here?
12 Did you ever say anything like that?
13 MR. MOSS: Objection, Your Honor. This
is 14 exactly what we spoke about at sidebar.
15 THE COURT: This is basically a question
16 without an answer.
17 MR. HEIM: Right.
18 MR. MOSS: There makes no --
19 THE COURT: I probably think it's the
same as 20 did you ever ask.
21 BY MR. ROSENBLATT:
22 Q. Did you ever ask?
23 A. I didn't have to ask. I knew why they
were 24 there.
25 Q. Did the president of Philip Morris only
pay

17772
1 that one visit?
2 A. To our laboratory?
3 Q. To your laboratory.
4 A. To our laboratory.
5 Q. Now, when the laboratory was finally
closed,
6 did that came out of the blue? I mean, I know
there
7 were events which made you recognize there was a
8 possibility that the laboratory would be closed.
But
9 on that particular day, did you have any warning
that
10 it was going to happen that day?
11 A. Our life for the last several months
there
12 was a roller coaster. We were up and down. But
at
13 that time, and for a period of time before that, a
14 month, two or three, we had no warning. We were -
- we
15 felt we were good to go.
16 Q. Who told you the lab -- who actually was
the
17 person who said to you: Your work is done, the
lab's
18 closed?
19 A. Jim Charles.
20 Q. And you said why, and he said it's a
business
21 decision.
22 A. Right.
23 Q. Did you ever say to him: What do you
mean, a
24 business decision?
25 MR. HEIM: Objection. Asked and
answered.

17773
1 THE COURT: Well, it's a rhetorical
question,
2 I think. You're getting into areas you're not
supposed
3 to get into.
4 BY MR. ROSENBLATT:
5 Q. I don't want the hear the answer. I
just
6 want to know did you ever ask Charles to be more
7 specific: Hey, I would like to know what you mean
by a
8 business decision.
9 Don't tell us what he said.
10 MR. MOSS: Once again, Your Honor --
11 MR. KIRBY: Your Honor, same thing.
12 MR. MOSS: Your Honor, it's the same
problem
13 as we had before.

14 THE COURT: I'm not so sure it's a
problem.
15 If he asked, he can say he asked. We haven't
gotten to
16 the answer.
17 BY MR. ROSENBLATT:
18 Q. Did you ask?
19 A. Can I answer yes or no?
20 Q. Yeah, yes or no.
21 A. No.
22 Q. Okay.
23 A. Can I explain that?
24 Q. No, no.
25 THE COURT: Wait for the next question.

17774
1 BY MR. ROSENBLATT:
2 Q. Why not?
3 A. Why didn't I ask?
4 Q. Why didn't you ask?
5 MR. MOSS: Objection, Your Honor.
6 THE COURT: Now we may get into an area.
7 MR. ROSENBLATT: I think --
8 THE COURT: We better talk over here.
9 (The following proceedings were had at
10 sidebar:)
11 MR. MOSS: Judge, you well understand
what's
12 going on here. You made a ruling --
13 MR. ROSENBLATT: He can't ever just make
an
14 objection. He always prefaces with you know
what's
15 going on, you know what Rosenblatt is pulling. I
16 really resent it.
17 MR. MOSS: Well, you shouldn't resent it
18 because you shouldn't do it.
19 But the point is, Judge, you've told him
what
20 areas not to -- you have heard the man answer
before.
21 It's more of the same. Getting into areas you
told him
22 not to.
23 Yes, I do criticize the way you do it.
24 MR. ROSENBLATT: I could care less about
you
25 criticizing.

17775
1 THE COURT: Gentlemen, wait a minute.
We've
2 been at this thing since July, and you haven't
fought
3 yet. Little skirmishes. Let's not fight.
4 Let me see if I can understand what's
going
5 on here. He was told by --
6 MR. HEIM: Charles.

7 THE COURT: -- Charles it was a business
8 decision. Did you ask him why, and he said no, I
9 didn't. Then you want to know why. He's going to
say,
10 in my opinion, he's going to say: Because I
already
11 knew.
12 MR. ROSENBLATT: That's right.
13 MR. HEIM: He already said that.
14 MR. ROSENBLATT: Exactly right. Then I
won't
15 ask him what did you know. I won't --
16 THE COURT: The problem with that is
that
17 leads to a supposition. That leads to an open-
ended
18 supposition with the jury.
19 MR. ROSENBLATT: But the supposition is
the
20 truth.
21 THE COURT: Well, they have to make
22 suppositions at this point with an answer of that
type.
23 I already knew. They're going to say, what did he
24 know?
25 MR. HEIM: He already said that once
before.

17776
that
1 MR. DOUGLAS: In that case, Your Honor,
2 question, wouldn't that permit the defendants then
to
3 cross-examine him on the question and clarify
anything
4 they felt --
5 THE COURT: If they want to.
6 MR. DOUGLAS: Any supposition --
7 THE COURT: But he's already indicated
that
8 he knew, whatever the reason was, that was a
conclusion
9 he reached in his own mind, and that's a
conclusion
10 that he can't testify about. So if he says he
didn't
11 do it -- I'll sustain the objection. I just don't
12 think we ought to get into that area, unless they
open
13 the door.
14 (The sidebar conference was concluded,
and
15 the following proceedings were held in open
court:)
16 BY MR. ROSENBLATT:
17 Q. Okay. From the time you go to Philip
Morris
18 until the time you're told the laboratory is
closed,
19 you always worked in the rat laboratory?
20 A. Correct.

the 21 Q. And then on April 5th, '84, you're told
22 rat laboratory is gone?
23 A. I was told Philip Morris does not do
24 behavioral pharmacology anymore.
25 Q. Which --

17777

so 1 A. Close the lab.
2 Q. So what happened to you? No laboratory,
3 what happens to your job?
that 4 A. Well, we were given three options at
and 5 point. They said: We'll pay you for six months
could 6 leave now, walk away, goodbye. They said: We
Or 7 place you elsewhere in the company if you want.
we'll 8 they said: You could take the six months, and
another 9 give you help and you can go out and look for
10 job for the six months.
elsewhere 11 The option I chose was to be placed
another 12 in the company. But over time, there was never
De 13 offer forthcoming, and as -- then I and also Dr.
about 14 Noble were looking for jobs, and we would inquire
at one 15 this, we never received another offer. In fact,
16 point finally we were told to stop asking --
17 MR. HEIM: Objection, Your Honor.
There's no 18 relevance to this.
19 THE COURT: I think there's some
relevance. 20 Overruled.
21 BY MR. ROSENBLATT:
22 Q. You were told what?
end 23 A. We were told to stop asking or you might
happened 24 up sweeping floors in the factory. So what
25 was --

17778

the 1 MR. HEIM: Move to strike, Your Honor.
2 THE COURT: Overruled.
3 A. -- ultimately we found other jobs. And
4 six-month period, for science, is a very difficult
5 time. Usually people in a university, when -- if
know 6 someone is denied tenure, for example, and they

7 they're going to be looking for a job, they have a
8 year, year and a half to search. We had on order
of
9 six months. So it was a difficult time.
10 Q. In your own mind, from your standpoint,
in
11 terms of how you left the employment of Philip
Morris,
12 did you quit? Were you fired?
13 A. We were fired. We were -- I don't know
what
14 else to call it. We were just fired and told to
leave.
15 Q. You were never offered a substitute job?
16 A. Never.
17 Q. Did anyone explain to you why the lab
had to
18 be closed like this, and why the rats had to be
killed,
19 so quickly?
20 MR. MOSS: Objection, Your Honor.
21 Q. Was that ever explained?
22 MR. MOSS: Repetitive, Your Honor.
23 THE COURT: The answer is yes or no.
24 MR. ROSENBLATT: I know.
25 A. No.

17779
1 Q. Okay.
2 A. In fact, I would just say we asked for
one
3 more day to finish one experiment, and that was
denied.
4 Q. Now, you know, I notice -- I notice in
5 looking at your curriculum vitae that there's a
section
6 which says: Technical reports proprietary
restriction,
7 Philip Morris USA, Inc., and its reports by you
and
8 Dr. De Noble relating to nicotine administration
with
9 the rats?
10 A. Right.
11 Q. These are articles you wrote or you were
12 thinking about writing?
13 A. Those were titles of experiments we ran
at
14 Philip Morris. Those were papers we would have
liked
15 to have published. We were not allowed -- I don't
16 remember exactly which ones are there. We were
not
17 allowed to publish those studies. When you're
18 searching for a job and you've been somewhere for
three
19 years as a scientist and you have a three-year
block
20 with no publications, that certainly doesn't make
you
21 more employable.

22 So we worked out with Philip Morris that
we
23 wanted to let the world know, to have some
indication
24 that we were actively doing research while we were
25 there, even though we were not able to produce

17780

1 actually -- actual published papers because they
would
2 not let us publish the results.
3 Q. Now, you left the employ of Philip
Morris in
4 December of '84, although the laboratory was
closed in
5 April of '84?
6 A. Right, correct.
7 Q. From the time you left Philip Morris up
until
8 today, did you ever try to publish or present
9 information concerning the work you had done on
10 nicotine and rats while employed at Philip Morris?
11 A. Yes, on several occasions we tried to do
12 that. We either submitted some of the results to
13 scientific meetings where we would go and do a
14 presentation, or we submitted manuscripts to
15 professional journals for publication. And once
Philip
16 Morris found out about this and they found out by
17 monitoring what goes on in science, keeping up
with the
18 literature, we received a letter from the counsel
--
19 the lawyers' office from Philip Morris in New York
20 telling us that we should not be doing that; that
we
21 should stop.
22 Once we ignored that letter and
continued to
23 do it, we received a second letter. And at that
point
24 we were told that if we continued this activity,
they
25 would take legal action against us.

17781

1 Q. So did you stop?
2 A. At that point we stopped.
3 Q. Now, when you were describing the work
being
4 done in the rat laboratory as secret, was it also
5 secret from other departments at Philip Morris
6 in-house?
7 A. We had -- I can't tell you what other
8 departments knew what we were doing to what
extent.
9 But we had a very closed laboratory. Our
colleagues
10 from other groups were not allowed to come in and

tour
research
had a
There
the
brought up
that
publish
the
areas

11 the lab. We did not give presentations to the
12 center the way all the other scientists did. We
13 very restricted circulation for our documents.
14 were some words we were not allowed to use in our
15 documents.
16 We were not allowed certainly to bring
17 outside visitors in, outside the company in to see
18 lab. And as I indicated, even our rats were
19 to the lab in secret, under a towel on a cart so
20 people could not see that they were there.
21 Q. Now, if you had been permitted to
22 what you wanted to publish, what would have been
23 focus of your articles?
24 A. We had completed studies on several
25 related to nicotine abuse, articles on nicotine

17782

where
laboratory
reach a
administration
been
sort
we
rats
which
work
into

1 self-administration in rats, articles on nicotine
2 tolerance in rats, an article on nicotine physical
3 dependence in rats and articles on brain sites,
4 in the brain nicotine is acting, again.
5 Q. In terms of your work in the rat
6 while employed at Philip Morris, did you ever
7 conclusion as to whether nicotine was a positive
8 reinforcer for rats?
9 A. Yes. That was a very early conclusion
10 demonstrated by the very first self-administration
11 study.
12 Up until that time, most self-
13 studies in animals with a variety of drugs had
14 well-established, the cocaines, the heroins, that
15 of thing. Studies with self-administration with
16 nicotine had not been as successful, and I think
17 completed -- we did complete the first thorough
18 demonstration and unequivocal demonstration in
19 that nicotine functions as a positive reinforcer,
20 means the animals will work to get it. They will
21 to press a lever to get the infusion of nicotine
22 their bloodstream.
23 Q. When a rat would press a lever and get

this
24 infusion of nicotine, was there anything
immediately
25 observable in their behavior, how they acted after
they

17783
1 got that shot?
2 A. They looked quite normal and then
usually
3 proceeded a short time later to press the lever
again
4 for more nicotine.
5 Q. In terms of writing up your reports and
in
6 terms of laboratory data, were there any
restrictions
7 imposed upon you as to language you could use or
not
8 use in referring to your findings and referring to
your
9 data?
10 A. We never used the word "drug" for
nicotine.
11 We were told not to call nicotine a drug. It was
a
12 compound. We were told to keep it out of the
realm of
13 the standard drugs of abuse, again, the cocaines
and
14 heroins.
15 In one case we were actually -- well,
wrote
16 down "nicotine." It was changed to just the word
17 "compound." And the word "addiction" was
certainly
18 never used openly or written down.
19 Q. How about the word "cancer"?
20 A. Cancer, which was something we did not
21 study -- there was a whole nother group studying
it --
22 that was never used openly. The word for cancer
was
23 "biological activity."
24 Q. During the period of time that you were
25 employed in the laboratory, I'm sure -- I assume
you

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1 had interaction with Dr. De Noble just about every
day.
2 A. Every day. We worked very closely
together.
3 Q. How about Dr. Charles?
4 A. Dr. Charles we had a lot of interaction.
He
5 was our immediate supervisor. If we didn't see
him
6 daily, it was several times a week.

7 Q. And how frequently with Dr. Osdene?
8 A. Dr. Osdene was Dr. Charles' boss, and
our
9 contact was less frequent, but still on a regular
10 basis, weekly, several times a month, depending on
his
11 schedule. He was a frequent visitor to the
laboratory.
12 Q. And William Dunn was the head of the
whole
13 thing?
14 A. No, William Dunn was initially the head
of
15 the behavioral research unit. When I came to
Philip
16 Morris, he ran this group of psychologists called
the
17 behavioral research unit. About six months after
I was
18 there, that unit was disbanded, and our
laboratory, the
19 behavioral pharmacology laboratory, was shifted
over to
20 the biochemical research division that was run by
Jim
21 Charles. And at that point Dunn was no longer --
he
22 was not in our chain of command.
23 Q. Now, during the period of time that you
24 worked in the laboratory, other than nicotine, did
you
25 have occasion to study a compound called

17785

1 acetylaldehyde?
2 A. Acetylaldehyde, yes.
3 Q. Is this how it's spelled:
4 A-c-e-t-a-l-a-l-d-e-h-y-d-e?
5 A. A-c-e-t-y-l-a-l-d-e-h-y-d-e.
6 Q. What is that?
7 A. It's a chemical. It's formed in
cigarette
8 smoke as the tobacco burns, and as you -- as a
smoker
9 sucks on the cigarette and you inhale the smoke,
you're
10 inhaling acetylaldehyde as part of the 4,000 or so
11 chemicals that exist in cigarette smoke.
12 Q. Was there a lever for the rats to press
if
13 they wanted acetylaldehyde?
14 A. We did studies with acetylaldehyde, and
we
15 found that acetylaldehyde in rats also would
maintain
16 self-administration. They would work to get it,
17 through the same procedure, the catheter into the
vein.
18 Q. Did that mean that it was a reinforcing
19 agent?
20 MR. MOSS: Objection.

21 A. That defines it as a positive
reinforcer.
22 Q. To your knowledge, has any commercial
23 cigarette manufactured by Philip Morris actually
24 utilized increased levels of acetylaldehyde?
25 A. I've read reports where --

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1 MR. HEIM: Your Honor, I'm going to
object to
2 anything that he doesn't have personal knowledge
of
3 here.
4 THE COURT: Or part of his work, I would
5 assume. We all read reports.
6 MR. HEIM: While at the company.
7 THE COURT: I think you better rephrase.
8 BY MR. ROSENBLATT:
9 Q. In terms of your reading reports about
10 increased levels of acetylaldehyde, are these
reports
11 you read when you were employed by Philip Morris?
12 A. No, they were read subsequently.
13 Q. But were they Philip Morris documents?
14 A. They were reports in the press quoting
Philip
15 Morris documents.
16 Q. What did they say?
17 THE COURT: Sustained.
18 MR. HEIM: Sustained, Your Honor?
19 MR. ROSENBLATT: You never know if you
don't
20 ask.
21 THE COURT: As we know.
22 MR. HEIM: Sometimes you don't know even
if
23 you do ask.
24 MR. ROSENBLATT: Is there an echo in
here?
25 BY MR. ROSENBLATT:

17787

1 Q. When you were actually employed at
Philip
2 Morris in the laboratory, did you and Dr. De Noble
have
3 some of your articles published?
4 A. Dr. De Noble had one article published
just
5 about the time I got there.
6 Q. In terms of articles that were to be
7 published, who did you or anyone else, the other
8 scientists, have to run it by? Who had to give
9 permission that this article was okay to publish,
this
10 article wasn't?
11 A. Well, in our case, again, we had a very
12 restricted audience. Articles from our laboratory
went

13 to Jim Charles, then to Tom Osdene. Then they
would go
14 to New York for review by Fred Newman, the
attorney,
15 and then we would get feedback, back down that
chain.
16 And if there were other people involved
--
17 there may have been -- I'm just not aware of who
else
18 might have read it. But those were people we
talked to
19 regularly and repeatedly if we wanted to know the
20 status of a paper or abstract. Charles, Osdene,
Fred
21 Newman, those three were the three.
22 Q. Specifically what research were you
pursuing
23 with respect to nicotine and acetylaldehyde in
terms of
24 self-administration in rats at the time the
laboratory
25 was closed in April of '84?

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1 A. The acetylaldehyde work was fascinating.
It
2 was of a lot of interest to the company, and to
our
3 consultants. We were all very interested in it
because
4 really here for the first time there was another
5 product in cigarette smoke that was identified
that
6 would -- that had reinforcing properties.
7 In the rat it was clearly self-
administered,
8 and even more interesting, when you put
acetylaldehyde
9 and nicotine together in the same bottle, you've
got an
10 effect that we call super-additive. The effect of
the
11 combined chemicals was greater than the effect of
the
12 two effects alone if you just added them together.
13 There was a synergistic effect or a super-additive
14 effect. So the rats really worked hard to get
that
15 combination.
16 Once that was demonstrated, there were a
--
17 just as with our nicotine analog meetings -- a
series
18 of discussions on could this nicotine
acetylaldehyde
19 combination, which exists already naturally in
20 cigarettes, be exploited and developed and used so
that
21 we could try and find the optimal ratio of each
22 compound that could then be transitioned into a

23 commercial cigarette.
24 Q. In your curriculum vitae, you indicate
that
25 you gave testimony before the United States House
of

17789

1 Representatives on the subject of research in the
2 tobacco industry in April of 1994. What were the
3 circumstances leading up to your appearance before
4 Congress? How were you contacted or --
5 MR. HEIM: Objection, Your Honor. We've
been
6 here many times before.
7 MR. ROSENBLATT: We've been there many
times
8 before.
9 (The following proceedings were had at
10 sidebar:)
11 MR. HEIM: This is going to testimony
before
12 the FDA testimony in 1994, and it's hearsay and --
13 MR. MOSS: It has no relevance.
14 MR. HEIM: -- it has no relevance to the
15 case.
16 MR. MOSS: Has absolutely no relevance
to
17 this case.
18 MR. HEIM: If anything it's -- I don't
know
19 if it's going to be viewed as bolstering or not.
But
20 what does this testimony before the FDA have to do
with
21 this?
22 THE COURT: Let's ask him.
23 MR. HEIM: It's hearsay.
24 MR. ROSENBLATT: These people are not
plucked
25 from the air. Here you have someone who left
Philip

17790

1 Morris in December of '84. Now he's in a
courtroom in
2 Miami, so I'm giving some --
3 THE COURT: No. If he did, in fact, go
and
4 testify --
5 MR. ROSENBLATT: He did testify.
6 THE COURT: What was it about? What did
he
7 testify about?
8 MR. ROSENBLATT: Research.
9 THE COURT: Which research, the research
he
10 has done?
11 MR. ROSENBLATT: Yes.
12 MR. MOSS: The same stuff he just

testified
13 about.
14 MR. DOUGLAS: It was not about the FDA,
Your
15 Honor. It was about the research that was
conducted
16 and the activities. He was familiar firsthand
with
17 what took place at Philip Morris with regard to
that.
18 That's correct.
19 THE COURT: So, he went before somebody,
20 governmental body or somebody. You say it wasn't
the
21 FDA.
22 MR. DOUGLAS: That's correct, before
23 Congressional --
24 MR. HEIM: I may be wrong.
25 MR. MOSS: It was a Congressional

17791
1 subcommittee.
2 THE COURT: So he went before a
Congressional
3 subcommittee and testified about the work he was
doing
4 at Philip Morris.
5 MR. MOSS: What he just testified about.
So
6 what is the relevance to show that Congress was
7 investigating? That's improper.
8 THE COURT: I don't know. What is the
9 relevance?
10 MR. MOSS: I do know.
11 MR. DOUGLAS: Well, Your Honor, among
other
12 things, when Dr. Mele, with Dr. De Noble, appeared
13 before the Subcommittee on Health, Energy and
Commerce
14 Committee in the House of Representatives, Philip
15 Morris actually responded publicly to their
testimony
16 and denied that some of the things he and Dr. De
Noble
17 were testifying to publicly were true about the
18 research that was done.
19 So, it actually goes to the claims here,
20 because this is back in the spring of 1994, of
fraud,
21 misrepresentation to the public about the
company's
22 knowledge of these matters.
23 MR. MOSS: Judge, Judge, we are
absolutely
24 getting into an area that -- I can't believe
anyone is
25 suggesting it. He testifies to Congress and PM
has a

17792

1 right to respond, and he is suggesting this is
relevant
2 to their fraud claim?
3 MR. HEIM: When we took his deposition,
none
4 of this came up in deposition.
5 MR. ROSENBLATT: It's on his curriculum
6 vitae.
7 MR. DOUGLAS: The defendants actually
8 questioned Dr. Mele about his Congressional
testimony.
9 THE COURT: I understand that. We're
just
10 talking about relevancy. There are a lot of ways
of
11 looking at it. Nobody has protested what he says
here
12 in public because he's just saying it today. But
he
13 said the same thing before publicly. And there
was
14 some sort of protest indicating what he was saying
was
15 not true.
16 MR. DOUGLAS: In a very public forum,
Your
17 Honor. And actually, Mr. Heim -- I don't know if
18 Mr. Heim suggested it, but the defendants actually
19 raised the issue of the Congressional testimony in
a
20 deposition last Thursday with Dr. Mele and not us.
21 MR. MOSS: Judge, the fact that somebody
was
22 questioned on a deposition, I mean, we are getting
into
23 areas of incredible prejudice here. What in the
world
24 are we doing?
25 THE COURT: Prejudice is one thing. It
could

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1 be very legal and very substantive. It still may
be
2 prejudicial to your case. The fact that it's
3 prejudicial doesn't mean it can't come in.
4 MR. MOSS: We haven't gotten over
relevance.
5 THE COURT: That's what I'm talking
about.
6 MR. MOSS: We're getting into areas of
7 prejudice.
8 THE COURT: I don't know. If what he
9 testified to today is the same as what he
testified
10 then, and you folks are saying publicly what he
said
11 was not true, it might become very relevant, the
fact
12 that he said it and there was a denial on your

part.

13 MR. MOSS: And what was the relevance of
14 that, sir, to issues to be tried in this case?
15 THE COURT: Credibility.
16 MR. MOSS: Credibility of who, sir?
17 THE COURT: Both parties.
18 MR. HEIM: Judge, it's so far afield.

But

19 first of all, I read the deposition, and whether -

-

20 whether there may have been some reference to the
21 witness having testified in 1994 in front of

Congress,

22 but I don't remember anything of any -- I don't
23 remember anything of any substance -- I don't

remember

24 him being asked what he said then, and I don't

remember

25 anything about Philip Morris' response, and I

don't

17794

1 know anything about a Philip Morris response.

Pursuant

2 to the Court's order, we were given a disclosure.
3 It's --

did you

4 THE COURT: Your question to him was,

5 appear before a Congressional subcommittee and

testify,

6 and what did you testify about. The thrust of

what you

7 said, the same thing as you've testified here.

8 MR. ROSENBLATT: Right.

9 THE COURT: Then what? What are you
going to

10 do?

11 MR. ROSENBLATT: That's it.

12 THE COURT: So he's told the story to
13 somebody else.

14 MR. MOSS: But the --

15 THE COURT: Now, the rules are, if what
you

16 say is attacked as being false --

17 MR. ROSENBLATT: And I'm going to ask
him --

18 THE COURT: -- then you can say and you
can

19 bring out some supporting information that what
you're

20 saying is the same as it was then and it's
correct. In

21 other words, if there hadn't been a denial on the
part

22 of Philip Morris or at least he thinks there was a
23 denial --

24 MR. MOSS: You mean you're suggesting
that a

25 party who is offered can show a prior consistent

17795

1 statement? There is no such rule, Your Honor.
2 THE COURT: If it's attacked as
inconsistent,
3 okay, which is where we're going. But we haven't
4 reached the point of showing it was attacked as
5 inconsistent.

6 MR. DOUGLAS: To clarify, Your Honor,
the
7 president, William Campbell, of Philip Morris at
that
8 time, a statement was issued by Philip Morris in
his
9 name, a document we have entered as an exhibit
that we
10 will seek to use later in the testimony. It was
also
11 reproduced in the Congressional hearing record.

12 THE COURT: That says?
13 MR. DOUGLAS: Well, that is where the
14 company, through their president and CEO, denied
what
15 Dr. Mele and Dr. De Noble testified to was
accurate,
16 was true. So it was an admission against
interest.
17 Certainly a contradiction.

18 THE COURT: Well, that denial is a
different
19 story.

20 MR. DOUGLAS: That is just to clarify
the
21 background.

22 THE COURT: The question at this point
is can
23 you get into evidence the fact that he told the
same
24 story to another body, and then later come in and
say
25 the reason that question was relevant is because
there

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1 has been a denial by the other side to show the
2 consistency of his statement?
3 I think, under those circumstances, you
can
4 do that, but not get into specifically what he was
5 telling.

6 MR. ROSENBLATT: Same subject.

7 THE COURT: Same subject.

8 MR. DOUGLAS: It does go to the fraud
claims
9 here because it was Philip Morris again publicly -

-
10 THE COURT: Only insofar as it goes that
far.
11 Did you testify before a subcommittee? Was it the
same
12 as what you testified to here? Yes. Off we go.

13 MR. MOSS: Obviously we object.
14 MR. ROSENBLATT: I want to ask him what
was
15 Philip Morris's response to his testimony.
16 THE COURT: If he knows.
17 MR. DOUGLAS: He is aware of that, Your
18 Honor; yes, he is.
19 MR. HEIM: I'm looking at the document
which
20 I've just seen for the first time, and it doesn't
say
21 anything about him.
22 (The sidebar conference was concluded,
and
23 the following proceedings were held in open
court:)
24 THE COURT: Guess what, folks?
25 THE JURORS: Later.

17797
1 THE COURT: But don't go home.
2 (The jurors exited the courtroom.)
3 THE COURT: All right. Have a seat,
folks.
4 Let's see where we're going to go with the
question.
5 VOIR DIRE EXAMINATION
6 BY MR. ROSENBLATT:
7 Q. Dr. Mele, I had asked you about
testimony you
8 gave before the United States House of
Representatives
9 on research in the tobacco industry in April of
1994.
10 You testified before Congress?
11 A. Correct.
12 Q. And did you testify generally in the
same
13 kinds of areas that you've discussed today?
14 A. Correct.
15 Q. What -- do you have knowledge of what
16 position Philip Morris took with respect to your
17 testimony following your testimony before
Congress?
18 A. Following the testimony?
19 Q. Right.
20 A. Immediately following the testimony?
21 Q. Whenever.
22 A. They were not complimentary. They put
out
23 press releases and interviews right there that
24 attempted to discredit our testimony, and they had
25 their current director of research, Dr. Ellis,
also

17798
1 attempt to discredit some of our research.
2 Q. I'm going to show you Engle Plaintiffs'
3 Exhibit Number 5460, the title of which is, Philip

4 Morris USA Statement Responding to Congressman
Waxman's
5 Press Conference, March 31, 1994, and ask you if
you've
6 seen this before.
7 MR. HEIM: Judge, you should have one of
8 these. (Handing)
9 THE COURT: Thank you.
10 What about your writing on the bottom?
11 MR. HEIM: Not my writing.
12 THE COURT: Somebody's writing.
13 MR. HEIM: You can fold it.
14 THE COURT: He's got a clean copy.
15 THE WITNESS: Yes. What was the
question?
16 BY MR. ROSENBLATT:
17 Q. Well, have you seen this document?
18 A. Yes. Yes, I have.
19 Q. And were you aware at the time of the
20 response of -- of course, the response of Philip
Morris
21 to at least Dr. De Noble's testimony as well as
your
22 own?
23 A. I was aware of Philip Morris's response,
yes.
24 Q. Which was what, with respect to your
25 testimony?

17799
1 A. No, in terms of Dr. De Noble's. I'm not
2 aware that they actually commented on my
testimony.
3 MR. MOSS: Judge, I think that --
4 BY MR. ROSENBLATT:
5 Q. Well, in terms of --
6 A. Other than Dr. Ellis, who clearly did.
7 Q. Dr. Ellis mentioned you by name?
8 A. She mentioned the work I conducted.
9 Q. And was Dr. De Noble's testimony to
Congress
10 in any way substantially different than your own,
or
11 did you cover the same subjects and reach the same
12 conclusions?
13 A. No, we were there at the same table and
there
14 was concurrence.
15 Q. There was concurrence. Okay.
16 THE COURT: Well, it's a little bit
17 difficult.
18 MR. MOSS: It's --
19 MR. HEIM: We ought to excuse the
witness.
20 THE COURT: I suppose. Step out in the
hall
21 for just a minute, please.
22 (The witness exited the courtroom.)
23 MR. HEIM: Your Honor, as you can see,
the
24 reason I wanted you to have the actual document in

25 front of you is that Philip Morris wasn't
responding to

17800

1 Dr. Mele. They were responding to a press
conference
2 that Congressman Waxman had. So Congressman
Waxman had
3 a press conference after the testimony and said
certain
4 things.
5 Philip Morris is responding with factual
6 information, as it saw it, to what was presented
by
7 Congressman Waxman in Congressman Waxman's press
8 conference or by whomever attended Congressman
Waxman's
9 press conference.
10 So I can't find Dr. Mele's name in here
at
11 all, as I look at it.
12 MR. MOSS: A minute ago Dr. Mele just
13 testified that they didn't make any response to
what he
14 said.
15 The whole thing is carrying -- you know,
once
16 again, Judge, to get back to what I said up there
17 before, what is the relevance of all of this? It
has
18 none, and it only has a potential to visit severe
19 prejudice on the defendant.
20 MR. DOUGLAS: Your Honor, may I clarify?
21 THE COURT: Yes, sir, if you want.
22 MR. DOUGLAS: Congressman Waxman's press
23 conference that counsel just referred to was a
press
24 conference at which Congressman Waxman issued a
study
25 that had been prepared by Dr. Mele and Dr. De
Noble

17801

1 dealing with the research, a study that had been
2 forcibly withheld by the company. And so, in
fact, it
3 was directly about the research that Dr. Mele and
4 Dr. De Noble performed at the company; the same
subject
5 matter of which they then addressed very shortly
6 thereafter in the testimony before Congress.
7 It was part of one and the same activity
over
8 a period just a couple of weeks. And the press
release
9 that you have in hand that was issued in the name
of
10 the CEO of Philip Morris deals with the refutation
of

that 11 that very same subject matter, the subject matter
12 was dealt with at the press conference that they
13 released this gentleman's study at and was dealt
with 14 again at that Congressional hearing.
15 This happened again within a space of a
very 16 brief period of time within the same month or
within a 17 couple of weeks in the spring of 1994. It's
18 inextricable, and it deals again with the research
they 19 did at Philip Morris and the time period that Dr.
Mele 20 was at the company. That's what he was testifying
to. 21
22 MR. MOSS: Judge, we've already had the
23 testimony of Dr. Mele as to what his research was.
give it 24 You've allowed them to fully explore that, and
25 to the jury.
you've 26 We now have a situation where -- well,

17802
heard 1 heard what the witness said. You still have not
subject 2 any response as to the relevance, because the
3 matter of what he had to say has been given to the
4 jury. We are now getting involved in a side issue
and 5 a side showing, I suggest, that has no relevance
to 6 allegations in this case. It is nothing but
prejudice. 7
and I 8 THE COURT: I've reviewed the document,
9 agree with defense objection on this matter. It
does 10 not make any reference to Dr. Mele. It really
doesn't 11 make any reference to whether or not they are
denying 12 the results of the experimentation done by Dr.
Mele 13 and/or Dr. De Noble.
14 So I don't think it meets the test of
what it 15 was intended to be on plaintiffs' representation.
16 MR. DOUGLAS: Your Honor, if I may refer
to 17 the -- the document that you're holding --
18 THE COURT: You know, it's a funny
thing. 19 When I make a ruling, I make a ruling. If you
don't 20 like it, you don't like it. I'm sorry. But I'm
not 21 going to go back and review it.

21 MR. DOUGLAS: I appreciate that, Your
Honor.
22 I was seeking to clarify something here.
23 THE COURT: No, all you're trying to do
is
24 get me to change my mind. Okay? So let's move
on.
25 If he went before the committee and

17803
1 testified, so be it. But that document doesn't do
2 anything.
3 Mark it as an exhibit for
identification,
4 plaintiffs' side, please.
5 Do you want five?
6 MR. ROSENBLATT: Yes, we would
appreciate it.
7 Thank you.
8 (Plaintiff's Exhibit 5460 was marked for
9 identification.)
10 (Brief recess)
11 MR. MOSS: Dr. Mele, my name is Ed Moss.
We
12 hadn't met. I had to ask you something outside
the
13 presence of the jury. During this break we just
had
14 about 15 or 20 minutes, did you discuss any aspect
of
15 what your testimony is going to be with Mr.
Douglas?
16 THE WITNESS: None.
17 MR. MOSS: Okay. Fine.
18 THE WITNESS: Nothing at all.
19 MR. MOSS: Thank you. That's it.
20 THE COURT: All right. Let's get the
jury
21 back in.
22 (The jurors entered the courtroom.)
23 THE COURT: All right. Have a seat,
folks,
24 please.
25 DIRECT EXAMINATION (Continued)

17804
1 BY MR. ROSENBLATT:
2 Q. Dr. Mele, did Philip Morris, during the
3 period of time that you were there, have the
scientific
4 technology to remove all the nicotine from a
cigarette
5 if that's what they chose to do?
6 A. Correct, yes, they did.
7 Q. And did they, in fact, make cigarettes,
some
8 cigarettes -- I'm not talking about commercial
9 necessarily, without --
10 A. They would make experimental cigarettes,

as
11 requested by Mr. Frank Ryan and Bill Dunn in the
12 behavioral research unit. They could take out
13 nicotine, they could add in nicotine, they could
14 manipulate the levels of nicotine. These were all
15 experimental cigarettes that were used in smoking
16 studies with humans at the company.
17 Q. During the period of time that you were
18 employed at Philip Morris, did Philip Morris,
through
19 its scientists, organic chemists, discover
analogs,
20 substitutes for nicotine, to meet the criteria of
21 retaining the effects of nicotine on the brain and
at
22 the same time eliminating any possible adverse
effects
23 on the heart?
24 MR. HEIM: Well, objection, Your Honor.
He
25 has no expertise to -- I would like to talk about
this.

17805
1 THE COURT: All right.
2 (The following proceedings were had at
3 sidebar:)
4 MR. HEIM: This witness has testified
that he
5 wasn't at all involved in the testing for
6 cardiovascular effects. His role in the analog
program
7 was testing for reinforcement.
8 There were separate people who were
qualified
9 to and did test for the cardiovascular side of it,
but
10 it was -- he -- and I believe he testified in his
11 deposition that he has no scientific knowledge or
12 qualifications to make that judgment.
13 THE COURT: Okay. Your question
incorporates
14 the brain, which he already testified about.
15 MR. MOSS: He testified about.
16 THE COURT: And the heart. And I don't
know
17 what his expertise is as it relates to the heart,
which
18 is what counsel's complaint is.
19 MR. ROSENBLATT: I think he would know -
-
20 THE COURT: I don't know if he would or
21 wouldn't -- you would have to establish a
foundation
22 that it would be within his area.
23 MR. MOSS: See, the problem we have is
you're
24 getting into opinion area.
25 THE COURT: I'm not so sure that's
opinion

17806
1 area.
2 MR. ROSENBLATT: I will ask him a
different
3 way.
4 THE COURT: If his test results and his
5 testing was to determine the effects of a chemical
on
6 the brain and the heart, that's a different story.
But
7 if he doesn't do the heart studies and he's
relying on
8 somebody else's work, that's a different matter.
9 MR. HEIM: And he didn't do heart
studies.
10 THE COURT: Okay. You can confine it to
the
11 brain if you want.
12 MR. MOSS: He's already testified to
that.
13 He testified to the two and four methylnicotine.
14 Remember that? He's already testified to the
brain.
15 THE COURT: At the same time eliminating
any
16 possible adverse effects. He may know that. I
don't
17 know what he knows. It may be one of the elements
of
18 his study. I don't know.
19 (The sidebar conference was concluded,
and
20 the following proceedings were held in open
court:)
21 BY MR. ROSENBLATT:
22 Q. You had told us earlier in your
testimony
23 about the goal of the analog that Philip Morris
was
24 hoping to achieve when you were first hired.
25 At the time the laboratory was closed in

17807
1 April of '84, from a purely scientific standpoint,
to
2 your knowledge, was that goal achieved?
3 A. Yes. An analog had been identified that
met
4 the criteria.
5 Q. That met Philip Morris's criteria?
6 A. Yes; in fact, two.
7 Q. Which you've discussed already?
8 A. Yes, the 2-prime methylnicotine was the
best
9 one and the 4-prime methylnicotine was number two.
10 Q. To your knowledge, were either of those
two
11 compounds ever used in a commercial cigarette at
Philip

12 Morris while you were there?
13 A. I have no idea.
14 Q. Have you ever testified in a courtroom
before
15 today?
16 A. No.
17 Q. What are you charging for your testimony
in
18 this case?
19 A. Expenses, whatever it costs me to get
here
20 and get home.
21 Q. Not charging anything for your time?
22 A. Nothing.
23 MR. ROSENBLATT: Your Honor, as I had
24 indicated, at this point we seek to introduce
certain
25 documents through Dr. Mele, and I'm going to ask

17808
1 Mr. Douglas to do that. He's more familiar with
them
2 than I am.
3 DIRECT EXAMINATION (Continued)
4 BY MR. DOUGLAS:
5 Q. Good afternoon, Dr. Mele. How are you,
6 hanging in there?
7 A. Fine. I'm doing fine.
8 MR. DOUGLAS: Mr. Heim, I'm going to be
9 looking at Exhibit 5452 to begin with.
10 Q. I'm going to ask you, Doctor, to take a
look
11 at this memorandum dated August 2, 1982, from Dr.
De
12 Noble to Dr. Charles on Philip Morris USA
letterhead,
13 and the subject matter is the promotion of Dr.
Paul C.
14 Mele to research scientist.
15 Do you see that?
16 A. Correct. Yes, I see it.
17 MR. HEIM: Your Honor, I'm going to have
an
18 objection to this document. But perhaps, to save
time,
19 we could take a few minutes and talk about how
we're
20 going to do these documents. Because none of
these
21 have been preadmitted like the other ones we've
dealt
22 with on the case.
23 THE COURT: Let's talk about it sidebar
and
24 see what we're talking about, and bring the
documents
25 with you, the ones you intend to introduce.

17809

1 (The following proceedings were had at
2 sidebar:)
3 MR. DOUGLAS: This memo, Your Honor --
well,
4 two things.
5 THE COURT: First let's find out what
his
6 objection is.
7 All of these?
8 MR. DOUGLAS: Some of them are thick,
but
9 yes, that's correct.
10 THE COURT: What is your objection to
this
11 particular document?
12 MR. HEIM: Well, I gather it's used to
show
13 he got promoted. I'm reading the caption as I go
14 along.
15 If that's the case, unless we attack his
16 credibility, it's unnecessary bolstering. I mean,
he
17 got promoted. He already testified he got
promoted.
18 Now, maybe there's some other reason I
don't
19 know about for offering the document.
20 THE COURT: What is the reason at this
point?
21 MR. DOUGLAS: Well, Your Honor, the
document
22 not only pertains to Dr. Mele's promotion;
actually
23 gets into the substance of the research, deals
with a
24 couple factors we wanted to identify that he
hasn't
25 specifically spoken to yet.

17810
first
1 As you can see, for example, on the
2 full paragraph on Page 2, Dr. Mele's research is
3 described dealing with behavioral pharmacological
4 factors and the development of tolerance. He's
5 testified generally about tolerance. We wanted to
6 enable him to get into a little more detail.
7 THE COURT: Why don't you ask him about
that?
8 You don't need that. All this does is bolster
9 credibility. I'll sustain the objection, if it
relates
10 to that. But if it just shows how smart he is and
what
11 he's doing, he already testified about that. But
if
12 there's an area here that he hasn't testified yet
13 about, you're still on direct. There is no reason
why
14 you can't flat-out ask him: What is your work on
so

15 and so?
16 MR. DOUGLAS: I will be happy to use
this as
17 a reference for myself, without entering the
document.
18 THE COURT: Okay. Now what are we going
to
19 do with the rest of these things? How are they
going
20 to work out? How many have you got? Looks to me
like
21 you've got dozens and dozens. Have you reviewed
all of
22 these?
23 MR. HEIM: No, Your Honor. I don't know
24 which ones -- I have a stack of documents, but I
don't
25 know which ones they are offering.

17811
1 THE COURT: Wait a minute.
2 MR. DOUGLAS: All of the documents have
been
3 disclosed previously to defendants, and I can
4 specifically identify the dates on which they
were, for
5 each document.
6 THE COURT: So they've been disclosed.
7 MR. MOSS: But not with reference to
which
8 witness. It makes a big difference.
9 MR. DOUGLAS: They actually were
disclosed
10 with regard to Dr. Mele, in connection with his
11 deposition last week.
12 THE COURT: Why do we have to make this
so
13 darned difficult? You know --
14 MR. DOUGLAS: We can run through them
15 actually rather quickly.
16 THE COURT: Sure we can. Look, the
stack is
17 only four inches thick. You know what's in them.
18 Somebody is going to have to read them and make
19 reference to some of these things and find out
whether
20 or not there is any objection, and if there is an
21 objection, why and what the objection is. And
we've
22 got to go through this whole mess here.
23 I don't know how many of these are going
to
24 be documents which could be objected to or not
objected
25 to, or accepted or -- I think we're -- looks to me
like

17812
1 the best thing to do here, unfortunately, is to

recess
have a
to
thing.
say
might
is, and

2 this witness's testimony at this point, let you
3 chance to go through the documents --
4 MR. MOSS: Right.
5 THE COURT: -- determine which of the
6 documents you would agree to as coming in without
7 objection, and if there is a substantive objection
8 any of these things, maybe we can --
9 MR. MOSS: We can take it up --
10 MR. HEIM: We could do that on Friday, I
11 guess.
12 THE COURT: It's a real time frame
13 MR. HEIM: Because it may be, if I look
14 through these, I may say a bunch of them I have no
15 objection to.
16 MR. ROSENBLATT: Sure.
17 MR. HEIM: Don't be surprised.
18 THE COURT: Christmas is coming. It's
19 Hanukkah, and you never know about that.
20 MR. ROSENBLATT: If it was Mr. Moss, I'd
21 no, but Mr. Heim --
22 THE COURT: He might surprise you. He
23 give you seven gifts.
24 MR. MOSS: Don't count on it.
25 THE COURT: Yeah, being as late as it

17813
anyway,
the
of
to.
Thursday
and
court:)
talk to

1 the fact that he's going to have to come back
2 we ought to go through these before he does.
3 MR. ROSENBLATT: That will save time in
4 long run.
5 THE COURT: Save a lot of time and a lot
6 argument. So we'll take them on Friday if we have
7 He's going to come back Tuesday?
8 MR. ROSENBLATT: Can I ask him?
9 MR. HEIM: If he can come back Tuesday?
10 MR. ROSENBLATT: I'm sure he can.
11 is impossible. Let me just --
12 THE COURT: Yes.
13 (The sidebar conference was concluded,
14 the following proceedings were held in open
15 THE COURT: Counsel has permission to
16 the witness for just one second about scheduling
17 problems. So don't get concerned.
18 (The following proceedings were had at
19 sidebar:)
20 MR. ROSENBLATT: Thursday is out.

21 MR. HEIM: Tuesday?
22 THE COURT: Tuesday is okay. All right.
23 We'll do that. That way it will be easier for us
and
24 for everybody.
25 MR. ROSENBLATT: Now, you haven't told
them

17814
1 yet --
2 THE COURT: Not yet. But I will.
3 (The sidebar conference was concluded,
and
4 the following proceedings were held in open
court:)
5 THE COURT: Okay. Folks, I realize
that,
6 from your vantage points, things look very
confused,
7 disjointed, unconnected, and time wasting and all
sorts
8 of things.
9 It's just something that we have to go
10 through in the presentation of a case. I've tried
to
11 explain that to you before. We're now at a stage
now,
12 it's twenty minutes to five, and counsel is going
to
13 get into an area regarding some documents. There
was a
14 stack of documents that he had, about four inches
15 thick. That's a lot of documents. Each one has
got to
16 be gone through and discussed and so forth and so
on,
17 which will take a lot of time.
18 So what we decided to do, and with the
19 cooperation of the witness, and I think it's very
20 important, is recess the session today, and have
the
21 witness come back at another time, and in accord
with
22 his schedule, I have to tell you where we're going
with
23 that. And while he's out, the lawyers and I will
work
24 on the documents, and we will get a lot of that
work
25 out of the way so we won't have to take up your
time as

17815
1 you sit around wondering what we're doing as we go
2 through all the documents and so forth. So that
takes
3 care of that problem.
4 Now, as you know, unfortunately,
Governor

5 Chiles passed away, and because of that, the
courts, in 6 deference to his death, are being closed tomorrow.
So 7 we will not have court tomorrow, and we'll have an
off 8 day then. That's Wednesday.
9 We'll come back Thursday, and we will be
in 10 session Thursday. And Friday, we will have a
workday. 11 And I understand you, one of the jurors, is going
to 12 have a knee operation of some sort. So you can't
be 13 here, so we will excuse the jury for that. But
you're 14 coming back Monday, right?
15 JUROR: Yes, sir.
16 THE COURT: For sure?
17 JUROR: Hopefully. It's just a knee.
18 THE COURT: We will reconvene Monday.
This 19 witness will come back on Tuesday. We'll be
picking up 20 that testimony on Tuesday, but doing something
else on 21 Monday?
22 MR. HEIM: Right, we are.
23 THE COURT: We're going to be doing
something 24 else on Monday, correct?
25 MR. ROSENBLATT: Yes, something.

17816
out. 1 THE COURT: Just want to straighten it
2 That's the kind of schedule we have to
3 follow. I know it sounds disjointed and
disconnected 4 and all of that. But believe me, that's just the
way 5 it is, folks. Sometimes you've just got to live
with 6 what you get.
7 So we appreciate your cooperation. I
hope 8 you have a pleasant day tomorrow under the
9 circumstances, and we'll see you folks tomorrow on
10 Thursday, usual time, 9:15.
11 JUROR: Are we coming back on the 4th or
the 12 11th?
13 THE COURT: Oh, yeah, I'm glad you told
me. 14 JUROR: Thank you. We're coming back on
the 15 11th.
16 THE COURT: We originally told you you
would 17 be off in that week between the 4th and the 11th

and,
18 yeah, you can still maintain that position. We --
19 there is -- the situation changed somewhat, but
then,
20 after due consideration of it all, it was decided
that
21 there are plans that had been made and we couldn't
22 unmake, so we'll be off the week of the 4th
through the
23 11th. Right.
24 Let me get my calendar so you know what
25 you're doing. We are going to be working, today
being

17817
1 the 15th, we'll be working on -- that's '99.
2 Okay. This is Tuesday the 15th. We'll
be
3 working the 17th for you folks. Come back and
work the
4 21, 22nd and 23rd. The 24th --
5 MR. HEIM: Half day on the 23rd, right,
6 Judge? Half day on the 23rd?
7 THE COURT: Depending on how the
evidence is
8 going, how the testimony is going.
9 JUROR: How many sidebars.
10 THE COURT: You're looking to get off.
We're
11 doing the best we can. Keeping in mind schedules
and
12 how things are, we'll do the best we can. But
we'll be
13 working the 21st, 22nd, and minimum half the 23rd.
14 Then you're off until the 4th of January --
15 MR. ROSENBLATT: 11th.
16 THE COURT: Wait a minute. You're
right.
17 January 11th. Okay? That looks like the schedule
18 we'll follow. Yes, sir.
19 JUROR: Let Kim know we don't have to
come
20 here on Friday.
21 THE COURT: She doesn't know that?
22 JUROR: She heard you, but she doesn't
23 believe it.
24 THE COURT: You don't have to be here,
but
25 she will. Friday will be an off day. We were
thinking

17818
1 of calling you back to work on Friday, and I would
have
2 called you back to work on Friday so we could get
our
3 work done. But unfortunately, one of your number
is
4 going to have a minor operation, and I don't want

to
5 interfere with that.
6 They might send you a cake. Whatever.
7 Folks, I do appreciate your tolerance,
your
8 patience and your understanding, most of all. It
gets
9 very difficult. You know that.
10 THE BAILIFF: Judge, he doesn't want to
work
11 next week.
12 THE COURT: I've got to make a tough
13 decision. You gotta.
14 Okay. Folks, those are the rules.
That's
15 the schedule we'll follow, and we'll see you on
16 Thursday morning.
17 (The jurors exited the courtroom.)
18 THE COURT: All right. During the
recess
19 between now and Tuesday, you must not -- and I
20 emphasize not -- discuss your testimony or
anything
21 about this case with anybody, which includes the
22 lawyers for either side, or any other person.
Okay?
23 It's important. Because you're still on the
witness
24 stand and under oath. It makes a difference.
25 THE WITNESS: Okay.

17819
1 THE COURT: We do appreciate your
cooperation
2 and willingness to work with us. I know it's
3 difficult. It's also difficult from this
standpoint.
4 THE WITNESS: I understand.
5 THE COURT: Okay. You can be excused,
sir.
6 Thank you.
7 Okay. Everybody may remain seated.
8 (The witness exited the courtroom.)
9 THE COURT: Okay. We had other things
that
10 we were planning on doing on Friday, but this
being a
11 witness who is also on the stand, I guess we'll
have to
12 take a portion of Friday to work out this
documentary
13 stuff, in addition to the other things we were
going to
14 do.
15 We have this other problem with Dr. --
16 MR. HEIM: Mr. Solberg.
17 THE COURT: -- Solberg is it? And we
ought
18 to discuss it also. Where are we going with that
now?
19 MR. HEIM: Where we left off, if Your

Honor 20 will remember this morning, I had moved to exclude
21 Mr. Solberg on the grounds that he was, at the
very 22 least, cumulative of other witnesses.
23 And just to bring it back for a minute,
Your 24 Honor has made reference from time to time of
Judge 25 Postman's order that said you can have two
witnesses

17820
1 per subject area. And while we haven't always
held to 2 that strictly, my point this morning was that this
3 gentleman really works for Dr. Blum or is
associated 4 with Dr. Blum and Doctors Ought to Care; that he
is 5 duplicative and repetitious of Dr. Blum in many
ways 6 with regard to sports promotion and using sports
7 promotions to target youth.
8 Dr. Blum's already said that. He's
testified 9 about it at great length with the Marlboro Cup and
all 10 those other things I mentioned this morning. I'm
not 11 going to repeat my argument.
12 In addition, we've already had Dr.
Cummings 13 in this area. We've had Dr. Siegel. We've had
14 Dr. Arnett all day today. We had Dr. Blum. And
this 15 would be either the fourth or fifth one of these
16 witnesses, depending on how you count them, who is
17 going to come in to testify again to the jury
about 18 advertising and promotion, which, for the many
reasons 19 I talked about this morning, I believe is
irrelevant 20 and preempted in any event.
21 But at the very least, it is cumulative.
22 Now, plaintiffs' counsel made reference
this 23 morning to saying that he wanted to use Mr.
Solberg to 24 testify about Philip Morris's advertising for its
25 television commercials that say -- that feature

17821
1 children that say children shouldn't smoke, youth
2 shouldn't smoke.
3 And my response to that is this: It may
be 4 that that evidence would be relevant on rebuttal

if the
would
want
for
to
has
people
course
not a
jury
that's why
a lot
some
then
would be

5 defense decides that it wants to introduce that
6 evidence in its case for a purpose that the court
7 permit. And if I intend to -- if I decide that I
8 to do that, and Your Honor says yes, that's a fair
9 purpose for it, then maybe it might be appropriate
10 Mr. Solberg, if he has something to say about it,
11 offer testimony in rebuttal about it.
12 But I don't know and I don't see how
13 testimony by Mr. Solberg now about Philip Morris's
14 campaign, one in which the jury expresses that it
15 not seen, and while counsel has said lots of
16 have seen it, I've -- I haven't seen it, and of
17 I don't watch much television, so I guess that's
18 fair reference.
19 But I don't think just saying, well, the
20 may have seen it, that makes it relevant, so
21 we should have Mr. Solberg testify about it makes
22 of sense to me.
23 As I said, if I decide it's relevant to
24 issue and seek to admit it and Your Honor permits,
25 it might be relevant. But I don't see that it

17822
cumulative
And
preempted
think
especially
and I
time to
all.
argument,
14

1 relevant until then.
2 And other than that, it's just
3 testimony. It's just piling on of the same stuff.
4 as I said this morning, you read those last three
5 sentences. You can see that it's flat-out
6 anyway.
7 So that's my objection to it. I don't
8 it's fair to pile on evidence generally, but
9 this kind of evidence, when there's a real doubt,
10 think Your Honor has expressed some doubt from
11 time whether this testimony should be coming in at
12 THE COURT: Well --
13 MR. ROSENBLATT: Judge, I made the
14 you know, this morning. You know, very clearly

told
15 you as to why Eric Solberg is just a completely
16 different area. His whole focus, I told you he
worked
17 on his thesis for seven years. It relates to
sports
18 promotions, not advertising per se. It's sports
19 promotion. That's his area, that's his specialty.
And
20 to --
21 THE COURT: Well, to what end? That's
what I
22 want to know. We've already heard about promotion
at
23 sporting events from a witness, maybe more than
once.
24 So to what end are you going to present this
testimony?
25 That they do this kind of thing, that
they

17823
1 sponsor sporting events, that they have their
2 billboards and advertising plastered all over a
3 television screen during a sporting event. Now
the
4 next question is: So what? Where do we go from
there?
5 MR. ROSENBLATT: They attract kids.
That's
6 the whole purpose.
7 THE COURT: That's, again, youth
targeting.
8 We've had a lot of that.
9 MR. ROSENBLATT: This is a different
10 perspective, Judge. This is from a different
11 perspective.
12 This is a man who has attended 200 --
over
13 200 -- he's got videos, he's watched them, he's
seen
14 them. There's no one in the country that's been
to
15 more sporting events -- no one has an explanation
of
16 what they do. Alan Blum car races. That's not
going
17 to be his testimony, how many times you see him on
a
18 television screen.
19 He's going to talk as a hands-on man who
goes
20 there and sees the interaction between the Philip
21 Morris people and how they promote, how they
induce
22 kids, how they entice kids at sporting events.
23 MR. MOSS: This is pure and simple
targeting
24 testimony, Your Honor.
25 THE COURT: Sounds like it.

17824

1 MR. HEIM: It is targeting. And
virtually 2 all of Mr. Solberg's articles were cowritten with
3 Dr. Blum. At least --
4 THE COURT: You know the one thing I
looked 5 at in this --
6 MR. HEIM: Disclosure.
7 THE COURT: -- designation which
interested 8 me, he's expected to provide specific example of
9 tobacco industry efforts in the area of marketing
to 10 children, including but not limited to videotape
11 example of such marketing activities.
12 Now, that's one thing. But prior to
that you 13 say: In addition to the above, Mr. Solberg is
also 14 expected to testify concerning his knowledge of
tobacco 15 industry internal documents. And then you put a
colon 16 in there. And he is expected to provide specific
17 examples of tobacco industry efforts in the area
of 18 marketing to children.
19 That led me to believe that you are
going to 20 be talking about internal documents, company
documents, 21 relating to that subject. What you're telling me
now 22 is he's talking about field work that he saw out
in the 23 field.
24 MR. ROSENBLATT: Both. Both. But his -
- 25 MR. HEIM: On qualifications, Judge,
this

17825

1 witness wouldn't even get close to satisfying the
Frye 2 test for an expert testifying on advertising or
3 marketing.
4 He has absolutely no background in it,
and 5 the only reason Dr. Blum got to testify about it,
as I 6 remember the argument about Dr. Blum, was he
collected 7 all this advertising all these years and put them
in 8 the archive and, therefore, knew all this
advertising. 9 And this man didn't do any of that either. He has
no

10 expertise in this. He doesn't meet the Frye test.
11 And we've heard so much about sports
12 marketing, you know, Marlboro Cup, Winston Cup,
images
13 on television.
14 THE COURT: I do think we're beating a
dead
15 horse when it comes to that.
16 You know, if he's got a document that
says:
17 Why don't we do this, we'll generate a great deal
of
18 public interest if we only sponsor sporting
events, and
19 I think it would be a good idea, so forth and so
on, if
20 he has a document that he can show that, that
might be
21 something worth testifying about.
22 MR. ROSENBLATT: You know, he's been in
town.
23 He's in town now. My intention is for him --
well,
24 would have been tomorrow. But to testify on
Thursday,
25 and let me -- I'm going to spend a lot of time
with him

17826
1 tomorrow. I think he has these documents, and I
2 haven't had the time to really sit down and have a
3 detailed conference with him.
4 THE COURT: The way I see it, to be
perfectly
5 honest with you, I think we've beat this horse a
lot.
6 I don't know whether the horse is dead yet, but
pretty
7 close to it.
8 I do get the impression, and I'm not
very
9 happy about it, that we're spending too much time
on
10 it. And we're making it a focal point of the
trial and
11 putting too much emphasis on this point. There's
so
12 much to this trial other than that. And if what
we're
13 doing is putting all of that emphasis here, and it
14 turns out we shouldn't have done it in the first
place,
15 as counsel for the defense says we have, we run
into a
16 lot, a lot of problems down the road, and up the
hill.
17 That's what I'm talking about.
18 So you know, enough is enough maybe.
From
19 what I can see here, his testimony is really
20 duplicative of Dr. Blum's testimony; maybe more

he 21 expansive, but nonetheless duplicative. What does
22 know that Dr. Blum doesn't know and hasn't already
23 testified to?
24 MR. ROSENBLATT: A lot.
25 THE COURT: What could he say?

17827
1 MR. ROSENBLATT: Dr. Blum runs a medical
2 practice, Judge.
3 THE COURT: Yeah, but what can he say
about 4 the marketing aspect of being involved in sporting
5 activities?
6 MR. ROSENBLATT: What he has eyeballed,
what 7 he's seen on the scene.
8 THE COURT: Every sporting activity he's
ever 9 attended? He will tell you he went to this game
and 10 that game and that game and there were a bunch of
kids 11 there with baseball caps on.
12 MR. MOSS: And they all liked it. So
what? 13 What's the point?
14 THE COURT: That's the "so what" of that
15 testimony. If they want to stipulate that they
sponsor 16 sporting events, which they do --
17 MR. ROSENBLATT: No. They won't
stipulate 18 that they lie about the purpose of what -- why
they 19 sponsor sporting events.
20 MR. HEIM: If --
21 THE COURT: That's something that I'm
not so 22 sure he can testify about. That's something for
the 23 jury to determine based upon what they've seen.
24 MR. ROSENBLATT: Hopefully, based upon
the 25 testimony of someone who has been -- the jury will
not

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1 hear from anyone on their side, from Philip
Morris, 2 whoever runs their sporting division, if they call
3 them, who has been at as many events as Eric
Solberg 4 has.
5 THE COURT: I don't really necessarily
think 6 that just because you're putting out 50, 100, 200
7 events at which children took part, because
sporting

8 events attract children, face it, that the jury is
9 going to have any different idea and concept of
what
10 it's all about than if you say there were five
events,
11 baseball games, World Series baseball games, which
will
12 definitely attract children. You don't have to go
13 through 100, 200 games.
14 MR. ROSENBLATT: It's not a question of
15 games. It's rodeos, all kinds of hands-on.
16 MR. HEIM: Testified about rodeos.
17 THE COURT: I have a real problem with
it,
18 Counsel. Maybe we are losing our focus here.
19 MR. HEIM: In terms of documents, Judge,
the
20 same documents were produced by plaintiffs and
said
21 they applied to both Dr. Blum and Dr. Solberg, the
very
22 same ones.
23 THE COURT: Here's what the problem is.
You
24 want to use this testimony to show that, by
sponsoring
25 these sporting events, they're really targeting
the

17829
1 children. Get the children interested, get them
to
2 like the tobacco company or whatever it is they're
3 selling, and we can attract future customers,
starting
4 from whatever age on up; and that you tie that in
with
5 something to the effect that the tobacco companies
deny
6 that's the ulterior motive.
7 Now, I don't know how you can tie the
two
8 together and make an assumption that just because
they
9 sponsor a sporting event, that not sponsoring it
for
10 any other purpose than merely to attract children,
or
11 at least that's the main, unless you find some
document
12 within the internal documents of the company that
says
13 that --
14 MR. ROSENBLATT: Well, obviously all my
time
15 has been with Arnett and Mele and, you know,
Solberg
16 is --
17 THE COURT: In my opinion, basically
this is
18 the guy you should have put on first, and you

wouldn't
19 have needed Blum or the other person, if he's that
20 strong. But you've already run through two or
three
21 witnesses. I'm inclined to agree with the defense
on
22 this issue. But I'll give you until Thursday
morning.
23 Okay?
24 But you've got to see where you're going
with
25 this.

17830
you
1 MR. ROSENBLATT: I will be able to tell
morning,
2 very definitively, when you ask me Thursday
3 I'll tell you exactly what I intend.
4 THE COURT: Okay.
5 MR. ROSENBLATT: What about the whole
6 issue -- Mr. Heim gets up here in a very cavalier
7 fashion: If I decide, you know, to put on
evidence of
8 100 million -- I've announced to the Court I want
to
9 get that in.
10 THE COURT: Let's put it this way:
They've
11 got the campaign going now. That's what you're
talking
12 about, the current campaign?
13 MR. ROSENBLATT: Yes.
14 THE COURT: I'm not going to let
testimony in
15 about that.
16 MR. ROSENBLATT: That's very prejudicial
to
17 the plaintiffs.
18 THE COURT: You may think so.
19 MR. ROSENBLATT: Why?
20 MR. HEIM: I mean, this may be one where
--
21 MR. ROSENBLATT: First I asked Your
Honor to
22 see --
23 THE COURT: I don't see the connection.
I
24 think this is something in your mind. I don't see
the
25 connection between it and what's going on, what
has

17831
unless
1 gone on since the inception of the lawsuit. And
2 you can tie it in -- you say you took somebody's
3 testimony. Unless you can tie that in, that would
be a

4 different story.
5 MR. ROSENBLATT: It's obvious this is
geared
6 for this trial.
7 THE COURT: It's not obvious.
8 MR. ROSENBLATT: You don't know that
yet.
9 THE COURT: I don't think it is.
10 MR. ROSENBLATT: Look at the date. She
said:
11 I came up with this idea after my deposition was
taken
12 in this case.
13 THE COURT: I don't know what she said.
14 MR. HEIM: What was interesting about
that
15 transcript is six hours Mr. Rosenblatt's counsel,
16 associate, took the deposition, and never asked
one
17 time the question that was supposedly the purpose
of
18 the deposition, which was: Did this have anything
to
19 do with the Engle trial?
20 Never asked the question. You can't
find it
21 in there. He was even asked by the counsel
defending
22 saying: Aren't you ever going to ask her does it
have
23 anything to do with the Engle trial or any other
trial?
24 THE COURT: Let me ask you another
thing.
25 Did we ever consider the issue of remedial
measures as

17832
1 it may relate to testimony? If what you're
talking
2 about is remedial. Okay?
3 And that's got a prohibition, too. So I
4 really don't see how you're going to work that in.
I
5 really don't.
6 So we'll talk about it on Monday -- I
mean on
7 Thursday. We'll see where we're going.
8 MR. ROSENBLATT: From our standpoint,
Judge,
9 it's incredibly ironic that they're complaining
about
10 our evidence on youth marketing, and they're now
11 involved in a \$100 million national campaign
directed
12 toward youth with professional actors. Every one
of
13 those kids that you saw in the 30-second -- not
one of
14 them is a normal, natural kid. They're all
actors.

15 They are all professional actors.
16 THE COURT: I don't want to get into an
17 esoteric argument with you as to what's going on.
But
18 that's a far cry from trying to get them addicted
to a
19 tobacco product. Okay? I mean, it's just a flip
side
20 of it.
21 And you think, just by doing that,
they're
22 going to endear themselves to the kids anyway. I
23 really don't know where you're going with it.
24 Now this situation that's going on now
may
25 very well be tied in with the two settlements.
I'm not

17833
I
1 sure if it is to that degree. I don't know. But
2 know it came out right after the settlements were
3 announced. How long it's been in the planning and
if
4 they understood that was going to be part of the
5 settlement or whatever may be, I don't know.
6 MR. ROSENBLATT: In the history of the
world,
7 when you talk about the rules and applying, in the
8 history of the world, in the history of not only
9 American litigation, but world litigation, there
has
10 never been a situation, never -- I mean, think
about
11 it. In this case you really -- every now and
then,
12 really have to step back and see what's going on.
And
13 what's going on here is so incredible, it's beyond
14 incredible.
15 You have the vigorous defense of a case
by
16 companies who have voluntarily paid out billions
upon
17 billions of dollars, and the premise here is --
the
18 jury doesn't know anything about this. The jury
19 doesn't know anything about this, they don't know
20 anything about the \$100 million campaign.
21 We are -- you are dealing -- you know,
you
22 can go to meetings and all these judges can walk
around
23 and give you their two cents or two dollars, and
they
24 mean well, but you've got to be here to believe
this.
25 This is an unbelievable situation when
you

17834

1 think about it. They have settled with 50 states
for
2 sums of money that have never been contemplated in
any
3 litigation anywhere in the world.
4 MR. MOSS: This is an incredibly
improper
5 argument.
6 THE COURT: Wait a minute. I don't know
7 where he's going with the statements.
8 MR. ROSENBLATT: Where I'm going with it
is
9 there are just some absolutely unique -- you've
got to
10 look at the big picture. That's what I'm saying.
11 You've got to look at the totality of the
circumstances
12 and the level of hypocrisy, the level of hypocrisy
that
13 we are dealing with, to pretend that the payment
of
14 these billions of dollars is not an admission of
guilt,
15 not an admission of the allegations in our
lawsuit.
16 That's what it is.
17 By anyone who's not involved in the
legal
18 system.
19 THE COURT: That's the problem.
20 MR. ROSENBLATT: By anyone normal who is
not
21 involved in the legal system. Of course, they're
22 admitting --
23 MR. KIRBY: Which is why there's a rule
of
24 evidence why it's not admissible.
25 MR. HEIM: Let me just respond to that
very

17835

1 briefly, Judge, because a couple --
2 MR. ROSENBLATT: Talk about fairness
we're
3 going to hear about fairness?
4 MR. HEIM: No, we're going to talk about
5 reality and talk about being straight about
things, and
6 not just being one-sided and unbalanced, and I
mean
7 unbalanced in the sense of only looking at one
side of
8 the issue and not possibly contemplating that
there's
9 something good going on and something right going
on,
10 and refusing to admit that that might be a
possibility.
11 Because that's actually the TV

commercials.

12 The TV commercials are directed at saying peer
pressure
13 is why kids smoke. That's what we believe. And
these
14 kids are telling other kids: You don't have to be
cool
15 to smoke.
16 It's a good thing to do. It tries to do
what
17 the critics of the tobacco company have said for
20 years they should be doing, they should be doing
more
18 of.
19 So finally when you come out and do it,
20 it's
21 always the same story. There's some way to
criticize
22 it, some way to be hyper-critical; it can't be
good
23 motives, it has to be something wrong with it.
24 And to start going after something like
that
25 is just remarkable to me. You just have to be
very

17836

1 cynical, very cynical to do that.
2 And to do it in the light of what's
going on
3 in this courtroom. Talk about what's going on in
the
4 courtroom. I mean, if the settlements are -- if
the
5 jury knows about the settlements, who is that
hurting?
6 That's hurting the defendants. Because the jury,
if
7 they learn about the settlements, they may well --
some
8 will and some won't -- some may well say
settlements
9 are made for lots of reasons; we're sophisticated
10 enough to know that. Maybe they think that's the
only
11 way they can survive.
12 Others say it's an admission of guilt.
We're
13 the ones who get hurt if they know that. I'm
taking my
14 chances with the jury when they say they haven't
15 watched or listened. I believe them, and I'm
willing
16 to take my chances with it.
17 But what I'm not willing to take my
chance
18 with is presenting evidence to this jury that asks
them
19 to give a damage award and punitive damages for
20 targeting youth when it's irrelevant and

preempted, and

21 that's what's going on here.

22 It's: Jury, there's something wrong
with

23 advertising in a way that gets kids to smoke.

There's

24 something wrong with advertising that appeals to

25 African-Americans or Hispanics. You should be
angry

17837

1 about that, and you should award damages because
these

2 people are going to get addicted -- which is what

3 counsel said -- and they're going to get sick. So
you

4 should be mad about that, and you should award

damages.

5 When everybody knows it's preempted and it

shouldn't be

6 done. That's something to be angry about.

7 MR. ROSENBLATT: Let me just mention
just one

8 thing. Mr. Heim made a statement about if the

jury

9 were to find out that the tobacco companies had

10 voluntarily paid billions of dollars that they
would

11 get hurt. That's not true.

12 History will show that the people who
are

13 despised in these settlements are plaintiffs'

lawyers,

14 because the American public understands what a

bonanza

15 this has been. The tobacco company just passed it

on

16 to the poor addicted smoker. Wall Street

understands

17 this is brilliant. 200 billion. Sounds like a

lot of

18 money. It's not going to hurt them at all.

They're

19 doing very well in the stocks.

20 But I would say the people who are
despised

21 are these lawyers. Most of them who didn't do a

lick

22 of work, who never stepped into a courtroom and

who are

23 walking away with billions. Those are the people

who

24 are despised, and it's going to hurt our side of

the

25 case. And that's what they hope.

17838

1 THE COURT: Okay.

2 MR. ROSENBLATT: And that's the

strategy.
3 THE COURT: Now, with all that said and
4 done --
5 MR. MOSS: Yes.
6 THE COURT: -- the problem that still
faces
7 the court is the legal reasons for doing anything.
And
8 that's what I'm faced with, is it legally
permissible
9 to do what you want to be done and, if so, what is
the
10 legal ground? And vice versa. Okay?
11 You know, I just can't see it at this
stage.
12 What you have as far as legal precedent for that
13 purpose, I would like to see something.
14 MR. ROSENBLATT: There's no factual
15 precedent, Judge. But I'm going to look. The
truth of
16 the matter is there is no factual precedent for a
100
17 million dollar campaign impacting the issues of a
trial
18 in the middle of a trial.
19 THE COURT: Yes, but there is something
to be
20 said along the lines of what -- remedial measures
21 issue. You can maybe find it under that concept.
22 That's basically what you're talking about.
They're
23 taking remedial measures to downgrade what you
claim
24 was some fault that they -- negligence, fraud,
whatever
25 you want to call it.

17839
1 So what are they doing now? Trying to
2 correct it. Now they're trying to correct it with
some
3 other -- almost like fixing the broken step. So
we've
4 got to get into that concept and that idea. I'm
sure
5 you will be able to find something. Maybe both
sides.
6 But I just can't hang my hat on some
esoteric
7 idea that you have that they're doing this
purposely
8 for some particular part of the case, and I'm not
9 convinced of that. And until I am, I just can't
see
10 the relevance.
11 MR. ROSENBLATT: So they can run the
12 campaign, and then they have the option of
deciding
13 whether they want --
14 THE COURT: I didn't even get into that
now.

15 That's not a given, either.
16 MR. ROSENBLATT: Sounds crazy.
17 THE COURT: Who says I'm going to let
them do
18 that?
19 MR. ROSENBLATT: No, I understand that.
I
20 understand that.
21 THE COURT: If you're going to try that,
22 you're going to have to come up with some legal
ideas
23 why.
24 MR. HEIM: I understand that.
25 MR. MOSS: We certainly understand. We

17840
the
1 haven't asked you for anything. We've just raised
2 issue, Your Honor.
3 THE COURT: Okay.
4 MR. MOSS: On Thursday --
5 THE COURT: That's why as far as Solberg
is
6 concerned, I'm not going to let him testify about
that
7 stuff, not at this point.
8 MR. MOSS: Judge, on Thursday, just
telling
9 Mr. Rosenblatt at some point we would like to --
10 THE COURT: Assuming Mr. Solberg doesn't
11 testify on Thursday.
12 MR. HEIM: We don't have a back-up plan.
13 MR. MOSS: One of the things we need to
talk
14 about on Thursday, I suggest, is to bring to a
15 conclusion the argument that Mr. Heim and I made
this
16 morning regarding -- the subject of the memo that
we
17 gave you.
18 THE COURT: You want a mistrial. That's
what
19 it said.
20 MR. MOSS: Judge, I think we need to
talk
21 about it.
22 MR. ROSENBLATT: We're not going to be
ready
23 to address that. I go back for lunch, I hand
Susan
24 this memo that who knows how many people have
worked on
25 for how long, and we're supposed to respond by

17841
1 Thursday?
2 MR. MOSS: Judge, let me -- if he
doesn't
3 want to do it Thursday, we'll do it Friday.

4 MR. ROSENBLATT: I don't want to do it
5 Friday.
6 MR. MOSS: Do it whenever you want.
7 MR. ROSENBLATT: Great. Thank you. The
12th of never.
8
9 MR. MOSS: I'm sure of that. But there
will come a time, Your Honor --
10
11 THE COURT: Oh, yeah.
12 MR. MOSS: -- that all of us have to
face where we are and what we're doing here in light of
what we think the law is. We would like a chance to
discuss with Your Honor whether plaintiffs want to
participate or not, I don't care. They have a right to, and
they have a right not to. But I think that we have a
17 serious problem. Not a matter of anything other
18 than the most serious type of problem. We've got to
address it.
19
20
21 All I'm suggesting is that before we
continue down this path, we need to do it.
22
23 THE COURT: Well, you took time to write
a memo and substantiate it with case law. They have
24 the same opportunity. I don't know how long it took
25 to get

17842
And I 1 it put together, but it didn't happen overnight.
2 do understand the difference and availability of a
3 staff of your size and a staff of their size, so
we've got to give them some time to get it done. Yeah,
we do have to address the issue, I agree.
4
5 MR. MOSS: That's all I'm saying.
6
7 MR. HEIM: Well, that's fair. I want
him to have a full chance for him to respond so we can
8 have a full discussion.
9
10 THE COURT: I agree with you. It's a
serious issue that needs to be addressed, and we are
addressing it in some regard, even as we speak.
11
12 MS. LUTHER: Judge, while we're on the
13 subject, the memo of law that was filed was not
14 filed on behalf of Liggett and Brooke. I filed a
joinder

16 today.
17 THE COURT: A one-paragraph joinder?
18 MS. LUTHER: One-paragraph joinder.
19 THE COURT: That's easy to read.
20 MS. LUTHER: It took forever to do it.
21 MR. HEIM: Your Honor, in the event the
Court
think
that
22 decides that Mr. Solberg should not testify, I do
23 that we have already prepared some depositions
24 could be read on Thursday.
25 THE COURT: Of --

17843
some
Spears.
Spears'
thing,
we
case.
to
--
you
got
1 17843 MR. HEIM: That is, we've been through
2 depositions.
3 THE COURT: Of whom?
4 MR. HEIM: I think -- what's his name?
5 MR. MOSS: Don't turn to me.
6 MR. HEIM: Begins with an "S." CEO,
7 THE COURT: You may have gone through
8 deposition.
9 MR. HEIM: Your Honor may not have.
10 THE COURT: That's that two-volume
11 isn't it?
12 MR. HEIM: I don't know.
13 MR. ROSENBLATT: Well that's -- I think
14 intended for Dr. Cahan, C-A-H-A-N.
15 THE COURT: Well, it's your side of the
16 They can't dictate who you're putting on.
17 MR. MOSS: We're not trying.
18 THE COURT: You put on whoever you want
19 put on.
20 MR. ROSENBLATT: But in practical terms
21 THE COURT: If you don't get Solberg on,
22 have to have something else.
23 MR. ROSENBLATT: My understanding was we
24 some stuff over to you today.
25 THE COURT: Today?

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mean?
1 17844 MR. ROSENBLATT: Yes. That was my
2 understanding.
3 MR. MOSS: Could we know what it is?
4 THE COURT: You mean -- depositions you
5 MR. ROSENBLATT: Yes.
6 Dr. Cahan is the only one that comes to

mind.
7 THE COURT: All right. I'll look
upstairs
8 and see if I have it, try to review it and get it
9 prepared in the event we need it.
10 MR. ROSENBLATT: Let me look and see if
11 there's anything else.
12 No. I guess Cahan is the only one I
know
13 about. Wait -- well, I wanted to play the
videotape of
14 Carolyn Levy, but that's -- although you may watch
--
15 we may ask you to watch that.
16 THE COURT: I may have to watch it. How
long
17 does it take?
18 MR. MOSS: Five and some-odd-hour depo.
I
19 assume it takes five and some-odd hours to watch.
20 THE COURT: Not on fast forward.
21 MR. ROSENBLATT: Or Dr. Mold, a former
22 Liggett scientist. We have his videotape -- he is
in
23 ill health. We have the videotape deposition from
24 Cipollone.
25 THE COURT: These have to be reviewed.

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1 MR. MOSS: They have to be reviewed, and
2 there's a lot we have to say about some of these.
3 MR. HEIM: There's things to do.
4 MR. ROSENBLATT: "Death in the West."
5 THE COURT: Maybe things we can do, but
I'm
6 not sure about the jury.
7 MR. MOSS: Right.
8 THE COURT: We'll have to meet that when
we
9 meet it.
10 MR. HEIM: The Cahan deposition, we'll
work
11 on that too.
12 THE COURT: All right. Meanwhile, maybe
you
13 can set the best brains to work and figure out
some of
14 the issues that I need to resolve.
15 MR. KIRBY: Your Honor, before you go, I
am
16 unclear about whether or not you have been
submitted a
17 Cahan deposition.
18 THE COURT: They said that some
deposition
19 was submitted. I'm going to go upstairs and take
a
20 look. Do you want to come with me?
21 MR. KIRBY: I will be happy to if you
want me
22 to. The reason I'm raising the question is we

have

23 responsibility for that witness.
24 THE COURT: Then come on up.
25 MR. KIRBY: And while we recently

received

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1 notice of their designations of that deposition,
our 2 objections are not yet due, and, therefore we
haven't 3 completed them and you don't have them. I didn't
want 4 you to go and review that deposition and not have
our 5 objections at the same time, thinking there were
none, 6 because they're not yet due, and we have not yet
7 finished them.

8 THE COURT: That's going to be a

problem.

9 MR. MOSS: That's why I asked what was
sent 10 up there.

11 THE COURT: Is that a long deposition or
12 short deposition?

13 MR. MOSS: Medium.

14 THE COURT: 200 pages?

15 MS. LUTHER: Judge --

16 MR. MOSS: Longer than that. That's not
17 medium. No, I think it's less than that.

18 MR. KIRBY: Your Honor, it's quite long.

It

19 was taken as a deposition for use at trial.

20 Mr. Rosenblatt's associate, Mr. Hoag, objected to
every 21 question we asked, and we have not completed our

22 objections. If Your Honor intends to look at this
23 before Thursday, then we'll make every effort to

get it

24 over here to you by noon tomorrow --

25 THE COURT: I'm not going to be here

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1 tomorrow.

2 MR. KIRBY: We'll deliver it wherever

you

3 want it delivered if you're going to review it
4 tomorrow.

5 THE COURT: That's not going to help.

6 MS. LUTHER: Judge, with regard to Dr.

Mold,

7 there is no way I can get the objections to you.

I'm

8 the only one in my firm working on this case.

9 THE COURT: Where does that leave us?

10 MR. ROSENBLATT: I'm sorry, Judge?

11 THE COURT: Well, they said that they

don't

if I 12 have the objection designations on Dr. Cahan, and
rule 13 don't have the objections, I don't know what to
14 upon, other than --
Why 15 MR. HEIM: Judge, why don't we do this?
the 16 don't we come in at nine on Thursday. We'll have
so 17 objections, we can run through them pretty quickly
18 we don't delay the jury too much.
19 THE COURT: We can try that.
20 MR. HEIM: Do you want to come in at
nine on 21 Thursday?
22 THE COURT: I have no problem. Come in
at 23 8:30, if you want.
24 MR. HEIM: I think nine would be fine,
Judge. 25 MR. MOSS: Judge, we will have the Cahan

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1 objections to you before the start of business
2 Thursday.
3 THE COURT: Okay. The start of business
is 4 now back to nine o'clock. So, get them to me,
say, 5 8:30 to quarter of.
6 MR. MOSS: Yes, sir. They'll be here by
7 8:30.
8 (Court was adjourned at 5:22 p.m.)
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